80-5492

Misc. No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON APPEAL
FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Tommy Whack, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, at the time of his trial and at appellate proceedings thereafter, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this Petition is attached hereto.

Alan H. Murrell

Alan H. Murrell
Public Defender for the
State of Maryland
800 Equitable Building
Baltimore, Maryland 21202
(301) 383-3053

Counsel for Petitioner

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IN THE

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Respondent

AFFIDAVIT

I, Tommy Whack, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.
2. Because of my poverty I am unable to pay the cost of said cause.
3. I am unable to give security for the same.
4. I believe that I am entitled to the redress I seek in said case.
5. The nature of said cause is briefly stated as follows:

I was tried by jury in the Circuit Court for Prince George's County, Maryland, and convicted of robbery with a deadly weapon and use of a handgun in the commission of that crime, and sentenced to terms of imprisonment of twenty years on the former and five years (consecutive) on the latter. On direct appeal, I contended that these

convictions and sentences violated the double jeopardy clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment. The Court of Special Appeals of Maryland affirmed in an unreported opinion filed July 27, 1979 (Court of Special Appeals of Maryland, September Term, 1979, No. 1394). The Court of Appeals of Maryland granted a writ of certiorari and reviewed the case, affirming in a reported opinion filed on July 7, 1980, ___ Md. ___, 416 A.2d 265 (1980). I am now seeking to have this double jeopardy issue reviewed by the Supreme Court of the United States by filing a writ of certiorari. [and by noting an appeal].

Tommy Whack
Tommy Whack,
Petitioner

Duly witnesses and
sworn to before me,
a Notary Public,
this 29th day of
September, 1980

Paul G. Trulick
Notary Public

80 - 5492

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OCTOBER TERM, 1980

TOMMY WHACK,

Appellant

v.

STATE OF MARYLAND,

Appellee

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Deborah K. Handel
Chief, Criminal Appeals and
Correctional Litigation Division
Office of the Attorney General
One South Calvert Street
Baltimore, Maryland 21202
(301) 659-4022

Counsel for Appellee

Alan H. Murrell
Public Defender for the
State of Maryland
800 Equitable Building
Baltimore, Maryland 21202
(301) 383-3053

Counsel for Appellant

Of Counsel:
Geraldine Kenney Sweeney
Assistant Public Defender
800 Equitable Building
Baltimore, Maryland 21202
(301) 383-6123

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Appellant

v.

STATE OF MARYLAND,

Appellee

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant Tommy Whack appeals the judgment of the Court of Appeals of Maryland entered on July 7, 1980.

QUESTION PRESENTED

Does the Double Jeopardy Clause prohibit imposition of cumulative punishments for convictions, obtained in a single proceeding, of offenses deemed "the same offense," despite the holding of the State's highest court that the legislature intended such a result?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is included as Appendix A. It is reported at ___ Md. ___, 416 A.2d 265 (1980).

JURISDICTION

Appellant was convicted and sentenced in the Circuit Court for Prince George's County, Maryland, of armed robbery and use of a handgun in that robbery; on direct appeal, the judgments were affirmed by both Maryland appellate courts, the state court of last resort holding that the state handgun statute, MD. CODE ANN., Art. 27, § 36B(d) (1976) as applied, was not repugnant to the Fifth Amendment of the United States Constittion. The judgment of the Court of Appeals of Maryland sought to be reviewed was filed on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) (1976). Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Colten v. Kentucky, 407 U.S. 104 (1972); Cohen v. California, 403 U.S. 15 (1971).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the following provisions is set forth in Appendix C:

U.S. CONST., amend. V

U.S. CONST., amend. XIV

MD. CODE ANN., Art. 27, § 36B (1976)

MD. CODE ANN., Art. 27, § 486 (1976)

MD. CODE ANN., Art. 27, § 488 (1976)

STATEMENT OF THE CASE

Appellant was tried by jury in the Circuit Court for Prince George's County, Maryland, and convicted, in a single proceeding, of robbery with a deadly weapon and of use of a handgun in the commission of that crime; he was sentenced to consecutive terms of twenty years and five years. Appellant appealed, challenging the imposition of the cumulative punishments. The Maryland intermediate appellate court affirmed the convictions and sentences in an unreported opinion. Whack v. State (Court of Special Appeals of Maryland, September Term, 1978, No. 1394, July 27, 1979). (App. B). The state's highest court, the Court of Appeals of Maryland, thereafter granted a petition for writ of certiorari, transferred the case to its regular docket, and after full briefing and argument, affirmed. Whack v. State, ___ Md. ___, 416 A.2d 265 (1980) (App. A).

The federal question was, as a matter of state law, timely and properly raised so as to give this Court jurisdiction to review the judgment on appeal. Although the issue of the consecutive sentences violating the constitutional protection against double jeopardy was not raised in the trial court, Maryland appellate courts recognize such issues on appeal irrespective of objection below, Rose v. State, 37 Md. App. 388, 377 A.2d 588 (1977), and the Court of Special Appeals did so in the instant case. The Court of Appeals of Maryland thereafter granted a writ of certiorari and decided the merits of the federal question. (see App. A, 3-4, 15-16).

In so doing, the Maryland Court of Appeals first examined the state statutes whereby robbery is punished by a maximum sentence of ten years, MD. CODE ANN., Art. 27, § 486

(1976); robbery with a deadly weapon, by a maximum of twenty years, as a result of the sentence enhancement provision contained in MD. CODE ANN., Art. 27, § 488 (1976); and use of a handgun in the commission of robbery by an additional sentence of five to fifteen years, as a result of the separate statutory offense contained in MD. CODE ANN., Art. 27, § 36B(d) (1976).[1] The Court held that the Legislature intended to allow the sentence for robbery to be twice increased because of the single aggravating factor of the use of a handgun in its commission:

> . . . it is clear to us that the General Assembly intended to authorize the imposition of punishment under both § 36B(d) and § 488 of Art. 27, when one commits a robbery with a handgun.

___ Md. at ___, 416 A.2d at 271 (App. A, 15). The Court of Appeals thus distinguished Simpson v. United States, 435 U.S. 6 (1978).

Assuming that the offenses would be "deemed the same under the required evidence test of Blockburger [v. United States, 284 U.S. 299, 304 (1932)]," the Court of Appeals further held that this identity of offenses did not present a double jeopardy bar to the imposition of the cumulative punishments. ___ Md. at ___, 416 A.2d at 271 (App. A, 15-16). In deciding this constitutional issue the Court relied on dicta in its own prior decision in Newton v. State, 280 Md. 260, 284, 373 A.2d 262, 269, n.4 (1977) (App. A, 15); the Court did not expressly rely on Whalen v. United States, 100 S.Ct. 1432 (1980), although the Court had earlier in its opinion made

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[1]The Maryland statutory scheme is essentially the same as the federal statutory scheme involved in Simpson v. United States, 435 U.S. 6 (1978).

passing reference thereto. _ Md. at _, and _, n.3, 416 A.2d 267 and 268, n.3 (App. A, 6 and 7).

It is from this decision of the Court of Appeals of Maryland that Appellant now appeals to this Court.

REASONS FOR REQUIRING PLENARY CONSIDERATION

Appellant requests plenary consideration because there is a conflict between decisions of state courts of last resort on a substantial federal question concerning the application of the constitutional protection against double jeopardy, which has not been settled by this Court's most recent decision in the area, Whalen, supra.

The conflict is exemplified by a comparison of the instant decision with recent decisions from the highest courts of the states of Delaware and Missouri. Hunter v. State, __ Del. ___, ___ A.2d ___ (June 24, 1980)[2], petition for cert filed, 49 U.S.L.W. 3136 (U.S. Aug. 22, 1980) (No. 80-283); Sours v. State, ___ S.W.2d ___ (Mo. Aug. 18, 1980) [hereinafter, Sours III][3], aff'g on rehearing, Sours v. State, 593 S.W.2d 208 (Mo. 1980) [hereinafter, Sours I], cert. granted sub nom. Missouri v. State, vacated mem., remanded for further consideration in light of Whalen v. United States, 48 U.S.L.W. 3767 (U.S. May 27, 1980) (No. 79-1565).[4] Hunter and Sours II hold that the double jeopardy clause prohibits

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[2]A copy of the opinion of the Delaware Supreme Court is attached as Appendix D.

[3]A copy of the opinion of the Supreme Court of Missouri in Sours II is attached as Appendix E.

[4]Counsel for Petitioner has been informed by Steven W. Garrett, counsel for the State of Missouri, that a cert petition on Sours II has been prepared and will be filed on or about the same time as the instant cert petition.

the imposition of cumulative punishments for convictions, obtained in a single proceeding, of offenses deemed "the same" under the Blockburger test, even though the legislature intended such a result. Whack, the instant case, holds that the double jeopardy clause does not prohibited cumulative punishments in the same situation.

This case clearly presents the question of whether the double jeopardy clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784 (1969), prohibits multiple punishments, in these circumstances, because the State law question of statutory interpretation has been decided adversely to Appellant by the State's highest court, In Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1973). This Court has previously indicated that this is a substantial federal question.

> Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the Blockburger test.

Simpson, supra, 435 U.S. at 11. This Court has on three recent occasions accepted cases presenting similar issues, but has never reached the constitutional question because each was decided on statutory grounds which obviated the need for consideration of the constitutional question. Simpson, supra; Whalen, supra; Busic v. United States, 100 S.Ct. 1747 (1980). But see Brintley v. Michigan, appeal dismissed for want of a substantial federal question, mem. 444 U.S. 948 (1979). In addition, this Court's recent grant of certiorari on an identical issue indicates the existence of a

substantial federal question. Missouri v. Sours, 48 U.S.L.W. 3767 (U.S. May 27, 1980) (No. 79-1565).

This is an issue on which state courts have long demonstrated conflict and confusion.[5] What makes Hunter, Sours II, and Whack noteworthy, is that each was decided subsequent to this Court's decision in Whalen, supra. While Whalen did not decide the constitutional issue (because of the majority holding based on statutory interpretation), there is language in the dissenting and concurring opinions which suggests that a minority of the Court has adopted a position consistent with the instant case. 100 S.Ct. at 1440 (White, J., concurring in part); 100 S.Ct. at 1441- 2 (Blackmun, J., concurring in the judgment) 100 S.Ct. at 1442- 6 (Rehnquist, J. and Burger, C.J., dissenting). There is no clear indication that a majority of the Court would so hold, and indeed, Hunter and Sours II both present persuasive reasons why a majority should not so hold.

The absence of a clear majority holding on this issue has created the instant conflict between the highest courts of several states and a consequent need for further clarification by this Court. As noted in Hunter:

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[5] See, e.g.: Whitton v. State, 479 P.2d 302 (Alas. 1970); Rust v. State, 263 Ark. 350, 565 S.W.2d 19 (1978); People v. Henry, 14 Cal. App. 3d 89, 91 Cal. Rptr. 841 (Cal. Ct. App. 1970); Jones v. State, 387 N.E.2d 93 (Ind. Ct. App. 1970); Wayne Cty. Pros. v. Recorder's Ct. Judge, 406 Mich. 374, 280 N.W.2d 793 (1979), appeal dismissed sub nom. Brintley v. Michigan, 444 U.S. 948 (1979); State v. Saxon, 193 Neb. 278, 226 N.W.2d 765 (1975); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975); State v. Best, 70 N.J. 56, 356 A.2d 385 (1976); State v. Gabaldon, 92 N.M. 230, 585 P.2d 1352 (N.M. Ct. App. 1978); Commonwealth v. Lee, 454 Pa. 526, 312 A.2d 391, 395 (1973) (Eagen, O'Brien, JJ., and Jones, C.J., concurring); State v. Boudreau, 113 R.I. 497, 322 A.2d 626 (1974); State v. Hudson, 562 S.W.2d 416 (Tenn. 1978); Jones v. Commonwealth, 218 Va. 18, 235 S.E.2d 313 (1977); State v. Foster, 91 Wash. 2d 466, 589 P.2d 789 (1979).

> We are not convinced that Whalen controls the instant case in view of the ambiguities contained therein which we find in unexplained conflict with prior double jeopardy principles which we thought settled. We are unwilling to abandon those principles until the United States Supreme Court has more clearly and definitely abandoned them.

(App. D, 24). See also, Sours II (App. E, 22-23). Appellant believes that the instant case provides an appropriate vehicle for the needed clarification.

Only a decision by this Court can resolve the conflict, insure uniform application of the Constitution, halt the multiplication of litigation, and provide the guidance needed by legislatures if their intents are to be given effect.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests plenary consideration of this Appeal.

Alan H. Murrell,
Public Defender for the
State of Maryland
800 Equitable Building
Baltimore, Maryland 21202
(301) 383-3053

Counsel for Petitioner

Of Counsel:

Geraldine Kenney Sweeney
Assistant Public Defender
800 Equitble Building
Baltimore, Maryland 21202
(301) 383-6123

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IN THE

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OCTOBER TERM, 1980

TOMMY WHACK,

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v.

STATE OF MARYLAND,

Respondent

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

APPENDIX A

OPINION BELOW

Whack v. State, Court of Appeals of Maryland ,September Term, 1979, No. 97, filed July 7, 1980.

IN THE COURT OF APPEALS OF MARYLAND

No. 97

September Term, 1979

TOMMY WHACK

v.

STATE OF MARYLAND

Murphy, C.J.
Smith
Digges
Eldridge
Cole
Davidson
Rodowsky,
JJ.

Opinion by Eldridge, J.

Filed: July 7, 1980

The issue in this criminal case is whether separate sentences may be imposed for robbery with a deadly weapon in violation of Maryland Code (1957, 1976 Repl. Vol.), Art. 27, § 488, and use of a handgun in the commission of a felony in violation of Art. 27, § 36B (d), where both convictions are based upon a single act of robbery with a handgun.

The petitioner Tommy Whack was convicted by a jury in the Circuit Court for Prince George's County on two counts of robbery with a deadly weapon, one count of use of a handgun in the commission of a felony (*i.e.*, robbery), and two counts of assault. All charges grew out of the same incident, namely the robbery of a Safeway grocery store in Landover, Maryland, on January 17, 1978. Moreover, the handgun charge was based on the same act of robbery as one of the armed robbery counts. Whack was sentenced to twenty years' imprisonment on each of the robbery counts, and five years on each of the assault counts, all of these sentences to run concurrently. He was sentenced to five years' imprisonment on the handgun count, to run consecutively to the armed robbery sentences. On appeal to the Court of Special Appeals, Whack, *inter alia*, challenged the imposition of separate consecutive sentences for robbery with a deadly weapon and use of a handgun in the commission of that robbery. The intermediate appellate court rejected this contention on the basis

of its earlier opinion in *Stevenson v. State*, 43 Md. App. 120, 403 A.2d 812 (1979), *aff'd on other grounds*, Md. , 413 A.2d 1340 (1980) [No. 82, September Term, 1979, decided May 6, 1980], and, in an unreported opinion, upheld Whack's convictions and sentences.[1]

Whack filed a petition for a writ of certiorari, presenting one question: "Did the Court of Special Appeals err in holding that it was permissible to impose consecutive sentences for robbery with a deadly weapon and use of a handgun in the commission of that crime?" The State filed a conditional cross-petition for a writ of certiorari, arguing that, because the propriety of the consecutive sentences had not been challenged in the trial court, the Court of Special Appeals abused its

---

[1] In *Stevenson*, the Court of Special Appeals rejected the argument "that the legislative intent in both the armed robbery and handgun statutes was to increase the maximum sentence where a weapon was involved, not to subject offenders to two additional penalties for the same aggravating circumstances ...." 43 Md. App. at 132. The Court stated (*ibid.*):

> "We believe the legislative intent simply was to impose a more severe penalty in an armed robbery situation when any kind of deadly weapon is used and to increase that penalty when a handgun is used."

The Court of Special Appeals went on to note in *Stevenson* that the imposition of the separate sentences does not violate double jeopardy principles, citing Coates v. State of Maryland, 436 F.Supp. 226 (D. Md. 1977).

discretion under Maryland Rule 1085 in considering the matter on its merits. We granted both the petition and the cross-petition. Because we shall hold that the Court of Special Appeals did not err in upholding the consecutive sentences, it is unnecessary to consider the issue raised in the State's cross-petition.

In Maryland, robbery is a single common law offense. Art. 27, §§ 486 and 488, do not create separate statutory offenses but merely fix the penalties for the one crime of robbery. Section 486 provides for not less than three and not more than ten years' imprisonment. If the robbery, however, is committed "with a dangerous or deadly weapon," § 488 prescribes twenty years' imprisonment as the maximum penalty for robbery. See generally, *e.g.*, *Bynum v. State*, 277 Md. 703, 707, 357 A.2d 339, 341, *cert. denied*, 429 U.S. 899, 97 S.Ct. 264, 50 L.Ed.2d 183 (1976); *Bennett and Flynn v. State*, 237 Md. 212, 214-216, 205 A.2d 393 (1964); *Jackson v. State*, 231 Md. 591, 593-595, 191 A.2d 432 (1963); *Hayes v. State*, 211 Md. 111, 126 A.2d 576 (1956). On the other hand, the use of a handgun in the commission of any felony and in the commission of certain violent misdemeanors is entirely a creature of statute, being part of the handgun control act of 1972, Ch. 13 of the Acts of 1972, codified as Art. 27, §§ 36B-36F. The use of a handgun in the commission of any felony, or any of the designated violent misdemeanors, is punishable by imprisonment of from five to fifteen years, with the five years being a non-suspendable

mandatory minimum sentence. Article 27, § 36B (d) and (e); *State ex rel. Sonner v. Shearin*, 272 Md. 502, 325 A.2d 573 (1974).

The principal thrust of petitioner's argument is that the Legislature did not intend, in enacting §§ 488 and 36B (d) of Art. 27, to authorize the imposition of both the enhanced penalty of up to ten additional years under § 488 for the use of a dangerous or deadly weapon, and the enhanced penalty of from five to fifteen years under § 36B (d) for use of a handgun, where there is a single act of robbery committed with only a handgun. In petitioner's view, only one offense is committed under these facts. The petitioner also suggests in his brief that if the Legislature did intend to authorize the imposition of both enhanced penalties under such circumstances, it would violate the Fifth Amendment's prohibition against double jeopardy, citing *State v. Hudson*, 562 S.W.2d 416, 418 (Tenn. 1978).

As this Court has said on several occasions recently, the general rule for determining whether two criminal violations, treated separately under the statutory provisions, should be deemed the same when both violations are based on the same transaction, is the so-called "same evidence" or "required evidence" test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *Gavieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911); and originally formulated in *Morey v. Commonwealth*, 108 Mass. 433 (1871). Under this test, the violations are separate if each "requires proof of

an additional fact which the other does not,'" *Gavieres*, 220 U.S. at 342, or, stated another way, if "[e]ach of the offenses created requires proof of a different element." *Blockburger*, 284 U.S. at 304. However, if only one has a distinctive element, they are deemed to be the same offense under the required evidence test.[2] We have generally applied this standard to decide the permissibility of successive trials, as well as multiple punishment, under the double jeopardy clause of the Fifth Amendment, under Maryland common law double jeopardy principles, and as a matter of Maryland merger law. *See, e.g., Lewis v. State*, 285 Md. 705, 722-723, 404 A.2d 1073 (1979); *Brooks v. State*, 284 Md. 416, 419-421, 397 A.2d 596 (1979); *State v. Frye*, 283 Md. 709, 713-715, 393 A.2d 1372 (1978); *Johnson v. State*, 283 Md. 196, 203-204, 388 A.2d 926 (1978); *Newton v. State*, 280 Md. 260, 266-268, 373 A.2d 262 (1977); *Bynum v. State, supra*, 277 Md. at 706; *Cousins v. State*, 277 Md. 383, 388-389, 354 A.2d 825, *cert. denied*, 429 U.S. 1027, 97 S.Ct. 652, 50 L.Ed.2d 631 (1976); *Thomas v. State*, 277 Md. 257, 266-267, 353 A.2d 240 (1976). The required evidence test has also been called a rule of statutory construction, *Whalen v. United States*, U.S. , , 100 S.Ct. 1432, 1438, 63 L.Ed.2d 715 (1980).

In addition, we have recognized that the required

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[2] For a very recent discussion of the required evidence test, *see* Illinois v. Vitale, U.S. , S.Ct. , L.Ed.2d (1980) [No. 78-1845, decided June 19, 1980, 48 U.S. Law Week 4741].

evidence test is not the only standard for determining when two statutory violations, based on the same transaction, will be treated as one. With regard primarily to successive trials, we have stated that "'there may be situations where the required evidence test . . . might not be adequate to afford the protection against undue harassment embodied in the purpose of the prohibition against double jeopardy.'" *Brooks v. State, supra,* 284 Md. at 423; *Cousins v. State, supra,* 277 Md. at 397.

The imposition of multiple punishment, however, is often particularly dependent upon the intent of the Legislature. Just last year in *Brooks v. State, supra,* 284 Md. at 423, it was pointed out that, although the required evidence test is the normal standard for deciding the allowability of separate sentences, the Legislature may not in certain circumstances intend that separate sentences be imposed for two offenses growing out of the same transaction, even though the two offenses are clearly distinct under the required evidence test. On the other hand, as recognized in *Newton v. State, supra,* 280 Md. at 274 n. 4, even though two offenses may be deemed the same under the required evidence test, separate sentences may be permissible, at least where one offense involves a particularly aggravating factor, if the Legislature expresses such an intent.[3]

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[3] In this connection, see the discussion in the various opinions filed xxxxxxx in Whalen v. United States, U.S. , 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

The petitioner, in arguing that the General Assembly of Maryland did not intend to authorize separate sentences under both § 488 and § 36B (d) for the same act of robbery with a handgun, relies chiefly upon *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978). In *Simpson*, according to the petitioner, the Supreme Court "answered the identical question now before this Court." (Petitioner's brief, p. 5.) *Simpson* held that when a person was convicted of robbing a bank "by the use of a dangerous weapon or device" in violation of 18 U.S.C. § 2113 (d) (providing an enhanced penalty beyond that for simple bank robbery under 18 U.S.C. § 2113 (a)), Congress did not also intend to authorize for the same act the imposition of an additional penalty for using "a firearm to commit any felony" proscribed by 18 U.S.C. §924 (c).

The Supreme Court in *Simpson* first noted that §§ 924 (c) and 2113 (d) were "addressed to the same concern and designed to combat the same problem: the use of dangerous weapons — most particularly firearms — to commit federal felonies." 435 U.S. at 10. The Court then pointed out (*id.* at 11),. quoting *Brown v. Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977), that ordinarily the "test for determining 'whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment,'" is the required evidence test of *Blockburger v. United States, supra*. The Court next observed that

the *Blockburger* test is primarily relevant in the double jeopardy context and that cases like the one before it "raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the *Blockburger* test." 435 U.S. at 11. Then, invoking the principle that courts avoid constitutional decisions where possible, the Supreme Court turned to the matter of legislative intent, *id.* at 12. The Court first examined the legislative history of 18 U.S.C. § 924 (c), which was an amendment to the original version of the Gun Control Act of 1968, and quoted the statement on the House floor of the amendment's sponsor that § 924 (c) was "'not intended to apply to Title 18, . . . 2113 . . . concerning armed robberies of . . . banks.'" 435 U.S. at 13. The Court pointed to other legislative history indicating that the Congress affirmatively adopted the sponsor's view, *id.* at 14. The Supreme Court went on in *Simpson* to rely upon the rule of statutory construction that any doubt concerning the legislative intent should be resolved against turning one transaction into multiple offenses, saying (*id.* at 15):

> "Even where the relevant legislative history was not nearly so favorable to the defendant as this, this Court has steadfastly insisted that 'doubt will be resolved against turning a single transaction into multiple offenses.' *Bell v. United States*, 349 U.S. 81, 84, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955); *Ladner v. United States*, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958). *See Prince v. United States*, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957). As we said in *Ladner*: 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' 358 U.S., at 178, 79 S.Ct. at 214."

Although at first glance *Simpson* may appear to be directly in point as petitioner urges, this identity disappears upon an analysis of the statutory scheme involved in the present case and its underlying history. Unlike the statutes construed in *Simpson*, there is no legislative history indicating that § 36B (d) of the handgun control act of 1972 was not intended to apply to robbery cases already covered by § 488 of Art. 27. Of course, the mere absence of legislative history would not preclude the application of the rule of construction invoked in *Simpson* if the intent of the Maryland Legislature were unclear. However, in our view the legislative intent is not unclear. Rather, there is every indication that the General Assembly intended both § 36B (d) and § 488 of Art. 27 to be applicable to robbery with a handgun.

As previously mentioned, the Supreme Court in *Simpson*, 435 U.S. at 10, viewed 18 U.S.C. § 2113 (d), relating to bank robbery with "a dangerous weapon or device," as being particularly aimed at the use of firearms. This is a major distinction between the federal act and the Maryland statute dealing with robbery "with a dangerous or deadly weapon." Art. 27, § 488 was not particularly addressed to the use of firearms. Rather, it was intended to encompass devices used for intimidation regardless of an ability to execute the implied threat, *Hayes v. State, supra*, 211 Md. at 115-116. The character of a weapon as deadly or dangerous, for the purpose of § 488, "'is not necessarily determined by its design,

construction, or purpose,'" *Bennett and Flynn v. State, supra*, 237 Md. at 215 (involving robbery with a microphone cord). *See also Jackson v. State, supra*, 231 Md. at 594-595, and cases there cited. Thus, as the cases in this Court make clear, the General Assembly in enacting § 488, although obviously intending that handguns be covered, was not focussing upon the particular dangers of handguns.

When it enacted the handgun control statute, Ch. 13 of the Acts of 1972, Art. 27, §§ 36B - 36F, the Legislature specifically addressed the matter of other statutes encompassing handguns, and it indicated its intent as to which of those other statutes should no longer cover the use of handguns. Thus, prior to 1972, Art. 27, § 36, had proscribed the carrying of concealed weapons and the carrying or wearing of weapons openly with intent to injure, including handguns. Also prior to 1972, Art. 27, § 36A, had provided a maximum penalty of three years' imprisonment for carrying "any . . . deadly weapon of any kind" on public school property. Finally, prior to 1972, there was local legislation regulating and penalizing certain uses of handguns. In the handgun control act of 1972, the Legislature dealt with the above-described statutory provisions, so as to prohibit the pyramiding of penalties under both the existing law and the new law for the unlawful use of a handgun. It amended Art. 27, § 36, to expressly delete handguns from the coverage of the concealed weapons statute (Ch. 13, § 1, of the Acts of 1972). It further amended Art. 27, § 36A, to provide

that where the weapon carried on public school property is a handgun, the penalty provisions of § 36A do not apply, but instead, the offender shall be sentenced in accordance with the penalty provisions of the new statute (Ch. 13, § 2, of the Acts of 1972). Lastly, with respect to local legislation regulating handguns, the Legislature stated (Ch. 13, § 6, of the Acts of 1972):

> "[A]ll restrictions imposed by the law, ordinances, or regulations of the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters."

Consequently, in enacting the handgun act, the Legislature was concerned with the matter of duplicative legislation. Where it desired no duplication it specifically amended or superseded those other statutes. Against this background, it is significant that the General Assembly did not amend Art. 27, § 488, to delete handguns from the coverage of that robbery statute.

The language of the 1972 handgun statute confirms that there was no intent to delete by implication penalties provided by other statutes, and confirms that the penalties set forth in the handgun act were intended to be imposed, *in addition to* the penalties under other applicable statutes. The Declaration of Policy, Art. 27, § 36B (a), discloses that the Legislature viewed handguns as a particularly aggravating problem, and one not effectively controlled by the laws applicable to weapons generally:

> "(a) *Declaration of policy.* -- The General Assembly of Maryland hereby finds and declares that:
>
> (i) There has, in recent years, been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involve the use of handguns;
>
> (ii) The result has been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity;
>
> (iii) The laws currently in force have not been effective in curbing the more frequent use of handguns in perpetrating crime; and
>
> (iv) Further regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of its citizens."

The declaration is followed by several sections regulating and/or proscribing the wearing, carrying or transporting of handguns. Then, in § 36B (d), the Legislature dealt with the use of a handgun in the commission of a crime:

> "Any person who shall use a handgun in the commission of *any felony* or any crime of violence as defined in § 441 of this article, shall be guilty of a *separate misdemeanor* and on conviction thereof shall, *in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor*, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the court to impose no less than the minimum sentence of five years." (Emphasis supplied.)

The language imposes the penalty under the section for use of a handgun in the commission of "any felony." As robbery with a dangerous or deadly weapon is within "any felony," the statutory language unambiguously imposes the penalty set forth in

§ 36B (d) if one uses a handgun in the armed robbery.[4] Section 36B (d) goes on to mandate that the use of the handgun in the commission of any felony shall be a "separate" offense, and that the mandatory minimum sentence under § 36B (d) shall be "in addition to any other sentence imposed by virtue of commission of said felony." Nothing could more plainly show an intent to impose whatever punishment is provided for the felony *plus* the punishment set forth in § 36B (d).

Finally, although not having the issue directly before us, this Court has previously interpreted § 36B (d) so as to preclude treating the handgun offense and the underlying felony as the same offense (*Dillon v. State*, 277 Md. 571, 584, 357 A.2d 360 (1976)):

> "The 'dominant purpose' as disclosed from the language in all of Art. 27 § 36B 'is to stop the alarming rise in the use of handguns in the commission of crimes of violence,' *Wright v. State, supra*, at 317, 330 A.2d at 487. Subsection (d) makes it clear that the use of a handgun in the commission of any felony or any 'crime of violence,' constitutes a separate misdemeanor, independent of the felony or 'crime of violence,' in connection with which a handgun may have been used, and mandates a separate minimum sentence. *State ex rel. Sonner v. Shearin*, 272 Md. 502, 325 A.2d 573 (1974); *Wright v. State, supra*. The provisions in the statute preclude the application of the doctrine of merger of such misdemeanor in the felony or 'crime of violence.' . . ."

---

[4] In this connection, the petitioner notes the reference to § 441 of Art. 27, and points out that § 441 (e), in defining "crime of violence," lists "robbery" but not "robbery with a dangerous or deadly weapon." However, as previously discussed, both basic robbery under § 486 and robbery with a deadly weapon under § 488 constitute the same common law felony of "robbery," and for purposes of § 441 (e), there would have been no reason to distinguish between them. Moreover, § 36B (d) itself covers "any felony." The reference to § 441 was simply for the purpose of indicating which misdemeanors should also be encompasse

See also Bremer v. State, 18 Md.App. 291, 343-345, 307 A.2d 503, *cert. denied*, 269 Md. 755 (1973), *cert. denied*, 415 U.S. 930, 94 S.Ct. 1440, 39 L.Ed.2d 488 (1974).

In sum, it is clear to us that the General Assembly intended to authorize the imposition of punishment under both § 36B (d) and § 488 of Art. 27, when one commits a robbery with a handgun. It has viewed the use of a weapon to intimidate the victim of a robbery as an aggravating factor, warranting the enhanced penalty of § 488. And when that weapon is a handgun, it has view it as a further aggravating factor, requiring the *additional* pena under 36B (d).

What has been said also requires the rejection of petitioner's suggestion of double jeopardy. Assuming that the two offenses should be deemed the same under the required evidence test of *Blockburger*,[5] what we said in *Newton v. State, supra*, 280 Md. at 274 n. 4, is dispositive:

> "It should be noted, however, that under certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test do[es] not violate the Fifth Amendment prohibition against double jeopardy. . . . [T]he legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test. . . ."

---

[5] The analysis in Illinois v. Vitale, *supra*, and Newton v. State, 280 Md. 260, 373 A.2d 262 (1978), would suggest that they should be deemed the same under the required evidence test. *But cf.* Couplin v. State, 37 Md.App. 567, 579-582, 378 A.2d 197 (1977), *cert. denied*, 281 Md. 735 (1978), for a different view.

The Legislature's concern about the use of a weapon to intimidate a robbery victim, and its additional concern when that weapon is a handgun, is certainly not unreasonable. When it expressly shows an intent to punish, under two separate statutory provisions, conduct involving those aggravating factors, the Fifth Amendment's double jeopardy prohibition has not heretofore been regarded as a bar.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED. PETITIONER TO PAY COSTS.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

APPENDIX B

Other Opinions in the Case

Whack v. State, Court of Special Appeals of Maryland, September Term, 1978, No. 1394, filed July 27, 1979 App. B-1

Stevenson v. State, Court of Special Appeals of Maryland, September Term, 1978, No. 1333, filed July 12, 1979 (companion case) App.B-8

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1394

September Term, 1978

TOMMY WHACK

v.

STATE OF MARYLAND

Morton
Melvin
Barrick, Samuel W.
(specially assigned),

JJ.

PER CURIAM

Filed: July 27, 1979

Appellant was convicted by a jury in the Circuit Court for Prince George's County (Ross, J., presiding) on two counts of armed robbery, one count of use of a handgun in the commission of a crime and two counts of assault. He was sentenced to twenty years on the first armed robbery conviction, five years on the handgun conviction to run consecutively to the first armed robbery sentence, twenty years on the second armed robbery conviction to run concurrently with the first, and two five-year terms for the assault convictions to be served concurrently with the first armed robbery sentence.

In this appeal appellant poses two issues:

> "1. Did the trial court err in denying the motion to suppress Appellant's confession?
>
> 2. Did the trial court err in imposing separate consecutive sentences for armed robbery and use of a handgun in the commission of a crime of violence?"

The record indicates that two armed men wearing nylon stocking masks entered a Safeway store in Landover about 4:15 p.m. on January 17, 1978. They relieved a truck driver for the store of his wallet and forced another employee to open the safe from which they removed money. They directed everyone in the store to lie on the floor while another employee was ordered to turn over the contents of the cash register he was operating.

Appellant was arrested on the strength of a statement given to the police by Matthew Green, implicating appellant as an accomplice in the robbery of a McDonald's restaurant.

When appellant was first arrested, he denied any involvement in the Mc Donald's robbery. He was placed in jail and bail was set at $25,000. Two days later appellant called Detective Montgomery of the Prince George's County Police Department and stated that he wanted to talk about the case. Detective Montgomery informed him that he would be available to talk within a few days. Because the detective went on vacation at that time, as well as having to pursue other duties, he did not contact appellant for a period of over two weeks. According to the detective, he took a statement from appellant on or about April 4, 1978, in which appellant denied participating in the McDonald's robbery but admitted to the Safeway robbery.

After the statement was given, appellant was asked by the detective whether he knew an individual named Posey for whom warrants were outstanding charging Posey with rape and armed robbery. Appellant said he knew Posey and thought he could locate him if he were released from jail. Several days later Detective Montgomery recommended that appellant's bond be reduced to $1,000 and appellant was released from jail, but apparently he never did find Posey.

Appellant now contends that his statement to Detective Montgomery in which he confessed participating in the robbery of the Safeway store should have been suppressed because it was the product of an illegal

arrest. He asserts that the only basis for the issuance of the warrant for his arrest was the information given to Detective Montgomery by Matthew Green and that "[i]n order for the information given by Green to constitute probable cause for the arrest of Appellant, it is necessary that Green's basis of knowledge and veracity be established. Aguilar v. Texas, 378 U.S. 108, 114-15, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964). Appellant does not challenge Green's basis of knowledge, as it was stated to be first hand. However, Appellant contends that the veracity of Green has not been established." He recognizes that "[a]s a general rule in Maryland a named informant's statement against penal interest will constitute a sufficient indication of reliability to fulfill the proof of veracity requirement. Merrick v. State, 283 Md. 1, 389 A.2d 328 (1978)."

It is argued, however, that at the time Matthew Green gave his statement implicating appellant, he advised Detective Montgomery that "he would take his chances on any charge I could place on him because he knew he could go up to Perkins and Spring Grove and con them people in letting him out." Appellant asserts that this statement by Green takes him out of the category of an individual giving a statement against his penal interest and, accordingly, Green's statement implicating appellant should not be permitted to serve as probable cause for the issuance of an arrest warrant for appellant. This argument overlocks the additional testimony of Detective Montgomery that if Green's statement "didn't fit to the exact

facts of the armed robbery, I would not in fact have effected the armed robbery warrant for Mr. Whack [appellant]. But Mr. Green was so precise on acts, dates and time of that armed robbery that I did in fact believe Mr. Green."

In Merrick v. State, 283 Md. 1, 4-5 (1978), it was said that an arrest warrant may be validly issued if the issuing official, in making an independent assessment of probable cause, concludes "that (a) the knowledge attributed to the informant, if true, would be sufficient to establish probable cause; (b) the affiant is likely relating truthfully what the informant said; and (c) it is reasonably likely that the informant's description of criminal behavior accurately reflects reality."

The appellant does not contest conditions (a) and (b) but insists that because Green did not believe he could be incarcerated for any length of time as a result of his statement implicating himself and appellant in the McDonald's restaurant robbery, his statement simply was not against his penal interest and therefore should be rejected under condition (c). The test, however, is whether it is reasonably likely that Green's "description of criminal behavior" accurately reflects reality. Detective Montgomery testified as follows:

> "Q. [Prosecuting Attorney] In your reviewing the facts set forth in Mr. Green's statement, was there any reason for you to doubt that this was in fact the statement of a participant in the armed robbery?
>
> A. No, sir.

Q. Why was this, sir?

....

A. Because Mr. Matthew Green related the facts to me as they were related to me by the victim and witnesses of both offenses.

Q. Are they facts only the perpetrator of an armed robbery would know?

A. That's correct."

On the basis of this testimony we have no difficulty in concluding that Green's statement implicating appellant in the McDonald's robbery constituted a "description of criminal behavior [which] accurately reflects reality." Accordingly, we think there was ample probable cause for the issuance of the arrest warrant against appellant. Inasmuch as his arrest was legal, "the claim that the statement given by him should have been suppressed as a fruit of an illegal arrest evaporates." Merrick, supra, at 19-20.

Appellant's final issue is identical to an issue raised in Stevenson, Ingram, Wilson and Estes v. State, _____Md. App. _____(1979) (No. 1333, September Term, 1978, filed July 12 _____, 1979). There Judge Couch, speaking for this Court, said at page 12:

> "Appellants argue that the legislative intent in both the armed robbery and handgun statutes was to increase the maximum sentence where a weapon was involved, not to subject offenders to two additional penalties for the same aggravating circumstances of the crime of robbery. We do not agree. We believe the legislative intent simply

> was to impose a more severe penalty in an armed robbery situation when any kind of deadly weapon is used and to increase that penalty when a handgun is used."

Thus, Stevenson is dispositive of appellant's identical contention here.

JUDGMENTS AFFIRMED;

COSTS TO BE PAID BY APPELLANT.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1978

No. 1333

ROBERT LOUIS STEVENSON, JR.,
EDWARD CLIFTON INGRAM,
KENT ALTON WILSON
and
ALFRED ESTES

v.

STATE OF MARYLAND

Melvin
Mason
Couch,
JJ.

Opinion by Couch, J.

Filed: July 12, 1979

Appellants Robert Louis Stevenson, Jr., Edward Clifton Ingram, Kent Alton Wilson and Alfred Estes were each convicted following a jury trial in the Circuit Court for Prince George's County (Melbourne, J.), of two counts of robbery with a dangerous and deadly weapon and one count of use of a handgun in a crime of violence. Each appellant was sentenced to a total of thirty years incarceration and each timely noted an appeal.

The factual background for these appeals is this: The First National Bank of Southern Maryland, located in the Marlow Heights Shopping Center, was robbed on April 4, 1978. Several males, some armed, entered the bank and took money from two bank tellers' cash drawers. Appellants Stevenson, Ingram and Wilson were arrested in the vicinity of the shopping center shortly after the robbery. Appellant Estes surrendered himself to the police several days later. Further facts will be supplied as each question presented by appellants is discussed. We are asked here to consider:

> "1. Did the trial judge err in denying motions to suppress evidence derived from the illegal arrests of Appellants Stevenson, Wilson and Ingram?
>
> 2. Did the trial judge err in denying motions for judgments of acquittal made by Appellants Stevenson, Wilson and Ingram?
>
> 3. Did the trial judge err in denying motions for severance of defendants made by all Appellants?
>
> 4. Did the trial judge err in imposing separate, consecutive sentences for armed robbery and use of a handgun in commission of a crime of violence, when such charges merged?"

Inasmuch as certain of these issues apply only to some of the appellants, we shall discuss the non-common issues separately as to individual appellants. Those issues that are common to all appellants shall be considered together.

1

Did the trial judge err in denying motions to suppress evidence derived from the illegal arrests of appellants: (a) Stevenson and Wilson

The record shows that at the time of the robbery three Washington, D. C. police detectives, in plain clothes, were riding in an unmarked car near the Prince George's County shopping center where the bank was located. One of the detectives, Officer Franklin, testified that he saw two men emerge running from a cloud of red smoke or dye , about 40 to 50 yards from the rear of the bank. One of the men had what seemed to be a bag in his hand from which apparently emanated smoke and bits of paper. The detective testified that he was familiar with the use by banks of a device, disguised as a packet of bills, which contains tear gas and dye. This device explodes shortly after it is removed from a drawer in the bank. He remarked to his two companions, "There must be a bank robbery and those two are possibly part of it." They pursued the two men by car and, after pulling abreast of the men, one of them identified himself as a police offi and ordered them to halt. One of the men turned and fled in the opposite direction. The second man turned into a driveway and found himself blocked by a blank wall, where he was soon apprehended. This man was subsequently identified as appellant Wilson.

The other man (Stevenson) was ultimately apprehended by D. C. Officer Bartholomew, who had been in the car with Officer Franklin. Bartholomew testified that he assisted Franklin in subduing Wilson, then saw the other subject run across the street and gave chase. He said he believed this subject was one of the two men he had seen running earlier, since the height and clothing were similar. The officer lost sight of the man for five or ten minutes as he ran behind an office building.

Bartholomew questioned bystanders as to whether they had seen anyone run through the area. They responded affirmatively and one person remarked, "He is in the bushes up there by that car." Bartholomew searched the bushes and found Stevenson lying on the ground. Stevenson was ordered out of the bushes and turned over to a Prince George's County police officer. Stevenson and Wilson moved to suppress all evidence concerning the arrest, and any fruits derived therefrom, on the basis of an illegal arrest which produced poisonous fruit. The thrust of their argument is simply that their arrests were illegal because the Washington, D. C. police officers who arrested them did not have actual knowledge that a felony had been committed or probable cause to believe they had committed it. The State contends it was only necessary to show that the arrestors had probable cause to believe a felony had been committed and that the appellants committed it.

A close reading of appellants' brief on this issue persuades us that they concede that the Washington, D. C. police officers were acting as private citizens[1] at the time of the arrests. Indeed, they conceded the point at oral argument. The trial court, in denying appellants' motion to suppress, did so on the basis that a citizen's arrest was being made and those making the arrests had probable cause to do so. This ruling was based upon Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 261 A.2d 731 (1970) (a civil case), wherein the Court of Appeals stated:

> "In Maryland a private person has authority to arrest without a warrant only when ... a felony has in fact been committed whether or not in his presence, and the arrester has reasonable ground (probable cause) to believe the person he arrests has committed it ..." Id. at 655.

We shall affirm the ruling of the trial court, but for a different reason. We find it unnecessary in resolving this issue to address the question of whether a private

1. Our consideration of this case would be quite different if off-duty Prince George's County police officers were involved. Section 18-163 of the Prince

1. (continued)

George's County Code (1975) provides:

> "Members of the Police Department are held to be always on duty, although periodically relieved from the routine performance thereof. They are subject at all times to orders from the proper authorities and to call by citizens. The fact that they may be off duty shall not be held as relieving them from the responsibility of taking police action in any matter coming to their attention requiring such action."

Thus, a Prince George's County policeman acts at all times in his official capacity and not as a private citizen.

citizen, in making an arrest for a felony not committed in his presence, must have actual knowledge that the felony has been committed or may, as is the case with a police officer making an arrest under similar circumstances, make the arrest having only reasonable grounds to believe a felony has been committed. Great Atlantic & Pacific Tea Co. v. Paul, supra; People v. Aldapa, 17 C.A.3d 184, 94 Cal. Rptr. 579 (1971); Opinions of Attorney General 11 (1964); 133 A.L.R. 603; Law of Arrest in Maryland, Kauffman, 5 Md. Law Review 125 (1941).[49]

We base our holding on the conclusion that the motion to suppress was obviously founded on a claimed violation of appellants' rights under the Federal Fourth Amendment's prohibition against unreasonable searches and seizures, which would bring into play the exclusionary rule laid down in Wong Sun v. U. S., 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963). Under the facts and circumstances of this case the exclusionary rule is inapplicable. In the past it has been held repeatedly that "[B]y history, judicial rule and application, the exclusionary rule as to evidence seized in violation of the Fourth Amendment comes into play only when the evidence is obtained by governmental action." Herbert v. State, 10 Md. App. 279, 284, 269 A.2d 430 (1970), cert. den., 260 Md. 720; accord Ward v. State, 30 Md. App. 113, 116, 351 A.2d 452 (1976), cert. den., 277 Md. 742. This Court in Herbert v. State, supra, elaborated further:

> "When an individual obtains incriminatory matter from an accused, no matter how improperly, and such matter comes into the possession of the government without a violation of the accused's rights by governmental authority, the exclusionary rule does not prohibit its use at trial." Id. at 284-85.

Appellants, citing People v. Martin, 225 Cal. App.2d 91, 36 Cal. Rptr. 924 (1964), and Thacker v. Commonwealth, 310 Ky. 702, 221 S.W.2d 682 (1949), argue

that the Washington, D. C. police officers were acting as agents of the State even though they made the arrests merely as citizens. Thus, they contend there was governmental action so as to bring into operation the exclusionary rule. We find these cases distinguishable.

In People v. Martin, supra, three City of Los Angeles policemen obtained information that the defendant had previous convictions for possession and use of narcotics. The defendant was not a resident of Los Angeles but lived in the City of Alhambra. The Los Angeles policemen traveled to the defendant's hotel in Alhambra. Once there, they approached the defendant in the hallway of the hotel; one officer identified himself as such and they arrested defendant for use of narcotics. The officers, having obtained permission to enter the hotel room from the defendant, searched it and found a quantity of heroin. The State argued upon the authority of Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574, 65 L.Ed. 1048 (1921), that the heroin was admissible since it was obtained in an unreasonable search and seizure by a private citizen. The California Court held Burdeau inapplicable and stated the following as its reason:

> "...[T]he evidence was discovered by the arresting officers themselves, albeit as private citizens. Their citizen's arrest was illegal ...(... no misdemeanor offense was either attempted or committed in their presence). Their search of defendant's premises, as an incident to their illegal citizen's arrest, was also illegal ... The seizure of the evidence during that illegal search must be realistically construed ... It was in the performance of their duties as officers and as employees and agents of the state. In fact, Officer Wesley so indicated when he identified the officers to defendant: ' ... stated, police officers.' Accordingly, the search and seizure must be held ... to have been within the proscriptions of both the state and federal constitutions." (Emphasis added.) 36 Cal. Rptr. at 927.

The Kentucky Court in Thacker v. Commonwealth, supra, held that citizen arrestors, who were particularly instructed by local police officers, the sheriff of the county, and state patrolmen to watch for a certain automobile and apprehend its occupants, one of whom was suspected of murder, were subject to the proscriptions against unlawful searches and seizures contained in Section 10 of the Kentucky Constitution. According to the Court a private individual, acting in concert with or at the direction of a peace officer must abide by Section 10 of the Kentucky Constitution. Id. at 683.

The present case bears no resemblance to either People v. Martin, supra, or Thacker v. Commonwealth, supra. Unlike the police officers in Martin, the officers here were not acting in the course of an investigation when they apprehended the appellants, although one D. C. detective did identify himself as a police officer. These detectives were in plain clothes, traveling in an unmarked car, and apparently off-duty. They simply did not invoke the authority of the State by their actions. Thus, we cannot conclude that they were engaged in the performance of their duties as officers and as employees and agents of the State. People v. Martin, supra at 927.

Nor do we think Thacker applicable to the present situation. None of the Washington, D. C. detectives were acting at the express direction of Maryland law enforcement authorities.

In the instant case the arrests were made by Washington police officers acting as private citizens. There is no evidence of government complicity on the part of the District of Columbia or the State of Maryland. Since this is true, then it follows that the evidence to be suppressed cannot be said to flow from impermissible

government action, thus the exclusionary rule is not applicable and the motion was properly denied. Herbert v. State, supra at 285.

(b) Ingram

Ingram's arrest was effected by a Prince George's County police officer under circumstances that appellant contends constituted an illegal arrest and thus all evidence of the arrest and its fruits should have been suppressed. This contention is based on the claim that the police officer lacked probable cause to make the arrest. Even if we were to agree with this sweeping, all-inclusive contention, which we do not (see Baker v. State, 39 Md. App. 133, 383 A.2d 698 (1978)), we nevertheless find no merit to the argument because it is evident from the record that the arresting officer had probable cause to make the arrest. It seems settled in Maryland, and elsewhere, that a police officer may make a warrantless arrest for a felony committed in his presence, or out of his presence if he has reasonable grounds to believe a felony has been committed and probable cause to believe the person arrested committed it. See Art. 27, Sec. 549B, subsection (c), which specifically grants this authority and has been determined to be declarative of common law rules of arrest without a warrant. See Wescott v. State, 11 Md. App. 305, 273 A.2d 824 (1971), cert. den., 262 Md. 750. We have previously defined probable cause, in the context of warrantless arrests, as follows:

> "Probable cause exists in this context when the facts and circumstances within the knowledge of the arresting officer, or of which he had reasonably trustworthy information, are sufficient to warrant a reasonably cautious person in believing that a felony had been committed by the person arrested." Id. at 307, quoting Cleveland v. State, 8 Md. App. 204, 218-19, 259 A.2d 73 (1969), cert. den., 257 Md. 732; see also Williams v. State, 14 Md. App. 619, 286 A.2d 803 (1972).

Turning now to the facts and circumstances surrounding Ingram's arrest, the record demonstrates that the arresting police officer, Sgt. Putnam, who was off duty, was conducting personal business a few doors from the subject bank when he became aware that a robbery was in progress at the bank. He proceeded toward the bank, following Sgt. Poe, a commissioned special security guard. Both had their guns drawn. Two men were seen coming out of the bank, the first carrying a handgun. When the men were ordered to halt the gunman ran toward the parking lot, where he escaped in an automobile, and the other man ran in the opposite direction. Putnam testified that before pursuing the gunman, he noticed the second man was wearing a burnt orange, lightweight jacket and a hat. When he returned to the bank after his unsuccessful pursuit of the gunman, he was advised that the second man had gone to the rear of the bank. He went to the rear of the bank and observed this individual standing on the sidewalk. Putnam further testified as follows:

> "Q. Now, when you approached that individual over there, was there anything about that individual in addition to what the civilian witnesses had told you that led you to believe that that person was also involved in the robbery?
>
> A. His physical stature, his body language. Like I said, skiddish, indecisive as to where to go, what to do, and the clothing was the same.
>
> Q. Tell us about the clothing. What about the clothing that made you think that was a person involved in the robbery?
>
> A. The two gentlemen that came out of the bank, the first moment I saw them, the second gentleman was wearing the same clothing that the guy in the rear of the bank had on, which was a lightweight burnt orange type jacket and a hat.
>
> Q. What about physical stature?
>
> A. Medium complexion, Negro male, medium build, 150 pounds.

Q. Are you referring to the person you saw in front of the bank or the person you saw on 28th Avenue?

A. One and the same.

Q. Those characteristics were the same on both?

A. Yes.

* * * *

I recognized him in my mind to be the person that I had initially seen at the front door."

Thereafter, Putnam arrested this man and identified him as appellant Ingram.

From this evidence we have no difficulty concluding that the trial court was correct in denying appellant's motion to suppress. We believe that these facts amply demonstrate that a reasonably cautious person would believe a felony had been committed and that appellant was one of the persons who committed it; thus Sgt. Putnam had sufficient probable cause to make the arrest.

2

Did the trial court err in denying motions for judgment of acquittal made by appellants Stevenson, Wilson and Ingram?

Appellants Stevenson, Wilson and Ingram next argue that had their motion to suppress been granted, as it should have been, then the evidence would be insufficient to sustain their convictions. We need not dwell long on this issue in light of our holding on the suppression issue. We do not understand these appellants to contend that if the trial court was correct (as we now hold) in denying their motion to suppress there would then be insufficient evidence to support their convictions. We find no merit to this contention whatsoever.

3

Should the cases have been severed for trial?

Appellants urge us to hold that the trial court erred in denying their respective motions for severance; we shall decline to so hold.

All of the appellants moved to sever their trials from those of the others and asked thereby for four separate trials. The trial court denied their pretrial motions as well as similar motions made during the course of the trial. In analyzing whether there was error in the denial of appellants' motions, we begin by referring to Md. Rule 745 c, which provides:

> "If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents or defendants, the court may, upon its own motion or the motion of any party, order separate trials of counts, charging documents or defendants, or grant any other relief justice requires."

This rule and its similar predecessors have been interpreted many times by the Court of Appeals and this Court. We can synthesize certain guiding principles to be followed in determining this issue from an examination of these cases. The purpose of Rule 745, providing for joint trials and separate trials under certain circumstances, is to save the time and expense of separate trials and to allow for separate trials as justice requires. See generally Lewis v. State, 235 Md. 588, 202 A.2d 370 (1964); Grandison v. State, 32 Md. App. 705, 363 A.2d 523 (1976), cert. granted, 279 Md. 692. The decision as to whether to grant a severance lies within the sound discretion of the trial judge. McKnight v. State, 280 Md. 604, 375 A.2d 551 (1977); Jones v. State, 38 Md. App. 432, 381 A.2d 317 (1978). Furthermore, joinder for trial is dictated under circumstances where most, if not all, of the evidence admitted at trial would have been admissible in each trial if the

several defendants had been tried separately. Johnson v. State, 38 Md. App. 306, 381 A.2d 303 (1977).

In examining the record we observe that all of the defendants were charged in a single indictment with committing the same offenses and that such offenses flowed from a bank robbery in which they all allegedly participated. Thus it would appear that nearly all of the evidence needed to prove guilt in a joint trial would have been introduced in separate trials and would have been admissible. This case is readily distinguishable from such cases as McChan v. State, 238 Md. 149, 207 A.2d 632 (1965), cert. den., 384 U. S. 1021, and Shingleton v. State, 39 Md. App. 527, 387 A.2d 1134 (1978). In McChan, the defendant was put on trial with his codefendants in four cases in which he was charged jointly with at least two of the other defendants, and in three cases in which he was not charged at all. The Court of Appeals concluded that this was improper, based on its finding in Lewis v. State, supra, that the defendants could not have been charged in a single indictment because the offenses were different as to each and, absent their agreement, they could not be tried jointly. In Shingleton, the defendant was compelled to stand trial with two codefendants at the same time that other substantive charges, not connected with the defendant, were being pressed against the two codefendants. This was held to have been an abuse of discretion. We conclude, under the facts and circumstances present in this case, that there was no abuse of discretion in denying the severance.

Should the convictions for robbery with a deadly and dangerous weapon merge with the conviction for unlawful use of a handgun in the commission of a crime of violence?

Appellants were convicted of two counts of armed robbery and one count for use of a handgun. For the latter convictions they received consecutive sentences. No complaint was made below regarding this issue and ordinarily we would not consider it on appeal, Md. Rule 1085. We shall consider the issue, however, since consecutive sentences were meted out. Rose v. State, 37 Md. App. 388, 377 A.2d 588 (1977). We are asked to vacate the handgun sentence on the strength of Brooks v. State, ___Md.___, ___A.2d ___(1979) (No. 4, September Term, 1978, filed February 16, 1979), wherein the Court of Appeals stated in part:

> "...even though offenses may be separate and distinct under the required evidence test, courts occasionally find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction." Slip op. at 8.

Appellants argue that the legislative intent in both the armed robbery and handgun statutes was to increase the maximum sentence where a weapon was involved, not to subject offenders to two additional penalties for the same aggravating circumstances of the crime of robbery. We do not agree. We believe the legislative intent simply was to impose a more severe penalty in an armed robbery situation when any kind of deadly weapon is used and to increase that penalty when a handgun is used. As we said in Wright v. State, 24 Md. App. 309, 330 A.2d 482 (1975), cert. den., 274 Md. 733:

> "The statute, after generally defining the crime, designates it as a 'separate misdemeanor.' It then provides that the sentence, which may range from 5 to 15 years, shall be 'in addition to any other sentences' which may be imposed. The dominant purpose of this language and of all of Section

> 36B is to stop the alarming rise in the use of handguns in the commission of crimes of violence. Md. Code, Art. 27, § 36 (a)." Id. at 317.

While not argued here, we note it has been held that the imposition of separate sentences for robbery with a deadly weapon and the use of a handgun in the commission of a felony does not violate double jeopardy principles. See Coates v. State of Maryland, 436 F. Supp. 226 (1977).

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY
APPELLANTS.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

APPENDIX Ba

Notice of Appeal, filed in the Court of Appeals of Maryland on October 3, 1980.

FILED 10-3-80
confirmed
by tel.

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1980

No. 97

TOMMY WHACK,

Appellant

v.

STATE OF MARYLAND,

Appellee

NOTICE OF APPEAL

MR. CLERK:

Pursuant to Supreme Court Rule 10, please notice that Appellant Tommy Whack is appealing from the judgment of the Court of Appeals of Maryland in the above captioned case, decision filed July 7, 1980. The appeal to the Supreme Court is taken pursuant to 28 U.S.C. § 1257(2). A copy of this notice of appeal is being filed with the Circuit Court for Prince George's County, the court possessed of the record.

Alan H Murrell

Alan H. Murrell
Public Defender for the
State of Maryland
800 Equitable Building
Baltimore, Maryland 21202
(301) 383-3053

Counsel for Appellant

IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1980

NO. 97

TOMMY WHACK,

Appellant

v.

STATE OF MARYLAND,

Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have caused service of the attached notice of appeal on the following parties, pursuant to Rule 28.

1. James H. Norris, Esquire, Clerk, Court of Appeals of Maryland. Service of the original on Mr. Norris was accomplished on Friday, October 3, 1980 by depositing the document, in a United States mailbox, first-class postage prepaid, addressed to his office, Courts of Appeals Building, Rowe Boulevard and Taylor Avenue, Annapolis, Maryland 21401.

2. Norman L. Pritchett, Clerk, Circuit Court for Prince George's County, Maryland. Service of a copy on Mr. Pritchett was accomplished on Friday, October 3, 1980, by depositing a copy of the document in a United States mailbox, first-class postage prepaid, addressed to his office, Court House, Upper Marlboro, Maryland 20870.

3. Deborah K. Handel, Esquire, Counsel for Appellee. Service of a copy on Ms. Handel was accomplished on Friday,

October 3, 1980, by hand delivering a copy to her office, 1300 One South Calvert Street, Baltimore, Maryland 21202. An acknowledgment of service is attached to the Jurisdictional Statement filed this same date.

These are the only parties required to be served.

Alan H. Murrell

Alan H. Murrell
Public Defender for the
State of Maryland
800 Equitable Building
Baltimore, Maryland 21202
(301) 383-3053

Counsel for Appellant

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Petitioner

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Respondent

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST., amend. v	App. C-1
U.S. CONST., amend xiv	App. C-1
MD. CODE ANN., Art. 27, § 36B (1976)	App. C-1
MD. CODE ANN., Art. 27, §§ 486 (1976)	App. C-5
MD. CODE ANN., Art. 27, § 488 (1976)	App. C-5

U.S. CONST., amend. V provides in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . .

U.S. CONST., amend. XIV provides in pertinent part:

> . . . [N]or shall any state depives any person of life, liberty, or property, without due process of law . . . .

MD. CODE ANN., Art. 27, § 36B (1976) provides:

> 36B. Wearing, carrying or transporting handgun; unlawful use in commission of crime.
>
> (a) Declaration of policy. -- The General Assembly of Maryland hereby finds and declares that:
>
> (i) There has, in recent years, been an alarming increase in the number of violent crimes perpetrated in Maryland, and a high percentage of those crimes involve the use of handguns;
>
> (ii) The result has been a substantial increase in the number of persons killed or injured which is traceable, in large part, to the carrying of handguns on the streets and public ways by persons inclined to use them in criminal activity;
>
> (iii) The laws currently in force have not been effective in curbing the more frequent use of handguns in perpetrating crime; and
>
> (iv) Further regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of its citizens.
>
> (b) Unlawful wearing, carrying, or transporting of handguns. -- Any person who shall wear, carry, or transport any handgun, whether concealed or open, upon or about his person, and any person who shall wear, carry or knowingly transport any handgun, whether concealed or open, in any vehicle traveling upon the public roads, highways, waterways, or airways or upon roads or parking lots generally used by the public in this State shall be guilty of a misdemeanor; and it shall be a rebuttable presumption that the person is knowingly transporting the handgun; and on conviction of the misdemeanor shall be fined or imprisoned as follows:

(i) If the person has not previously been convicted of unlawfully wearing, carrying or transporting a handgun in violation of this section, or of unlawfully carrying a concealed weapon in violation of § 36 of this article, or of unlawfully carrying a deadly weapon on public school property in violation of § 36A of this article, he shall be fined not less than two hundred and fifty ($250.00) dollars, nor more than twenty-five hundred ($2,500.00) dollars, or be imprisoned in jail or sentenced to the Maryland Division of Correction for a term of not less than 30 days nor more than three years, or both; provided, however, that if it shall appear from the evidence that the handgun was worn, carried, or transported on any public school property in this State, the court shall impose a sentence of imprisonment of not less than 30 days.

(ii) If the person has previously been once convicted of unlawfully wearing, carrying, or transporting a handgun in violation of § 36B, or of unlawfully carrying a concealed weapon in violation of § 36 of this article, or of unlawfully carrying a deadly weapon on public school property in violation of § 36A of this article, he shall be sentenced to the Maryland Division of Correction for a term of not less than 1 year nor more than 10 years, and it is mandatory upon the court to impose no less than the minimum sentence of 1 year; provided, however, that if it shall appear from the evidence that the handgun was worn, carried, or transported on any public school property in this State, the court shall impose a sentence of imprisonment of not less than three years.

(iii) If the person has previously been convicted more than once of unlawfully wearing, carrying, or transporting a handgun in violation of § 36B, or of unlawfully carrying a concealed weapon in violation of § 36 of this Article, or of unlawfully carrying a deadly weapon on public school property in violation of § 36A of this article, or any combination thereof, he shall be sentenced to the Maryland Division of Correction for a term of not less than three years nor more than 10 years, and it is mandatory upon the court to impose no less than the minimum sentence of three years; provided, however, that if it shall appear from the evidence that the handgun was worn, carried, or transported on any public school property in this State, the court shall impose a sentence of imprisonment of not less than 5 years.

(iv) If it shall appear from the evidence that any handgun referred to in subsection (a) hereof was carried, worn, or transported with the deliberate purpose of injuring or killing another person, the court shall impose a sentence of imprisonment of not less than five years.

(c) Exceptions. -- (1) Nothing in this section shall prevent the wearing, carrying, or transporting of a handgun by (i) law-enforcement personnel of the United States, or of this State, or of any county or city of this State, (ii) members of the armed forces of the United States or of the National Guard while on duty or traveling to or from duty; or (iii) law-enforcement personnel of some other state or subdivision thereof temporarily in this State on official business; (iv) any jailer, prison guard, warden, or guard or keeper at any penal, correctional or detention institution in this State; or (v) sheriffs and temporary or full-time sheriffs' deputies, as to all of whom this exception shall apply only when they are on active assignment engaged in law enforcement; provided, that any such person mentioned in this paragraph is duly authorized at the time and under the circumstances he is wearing, carrying, or transporting the weapon to wear, carry, or transport such weapon as part of his official equipment.

(2) Nothing in this section shall prevent the wearing, carrying, or transporting of a handgun by any person to whom a permit to wear, carry or transport any such weapon has been issued under § 36E of this article.

(3) Nothing in this section shall prevent any person from carrying a handgun on his person or in any vehicle while transporting the same to or from the place of legal purchase or sale, or between bona fide residences of the individual, or between his bona fide residence and his place of business, if the business is operated and substantially owned by the individual, or to or from any bona fide repair shop. Nothing in this section shall prevent any person from wearing, carrying, or transporting a handgun used in connection with a target shoot, formal or informal target practice, sport shooting event, hunting, trapping, dog obedience training class or show or any organized military activity while engaged in, on the way to, or returning from any such activity. Nothing in this section shall prevent any bona fide gun collector from moving any part of all of his gun collection

from place to place for public or private exhibition. However, while traveling to or from any such place or event referred to in this paragraph, a handgun shall be unloaded and carried in an enclosed case or enclosed holster.

(4) Noting in this section shall prevent a person from wearing, carrying, or transporting a handgun within the confines of real estate owned or leased by him or upon which he resides or within the confines of a business establishment owned or leased by him. Nothing in this section shall prevent a supervisory employee from wearing, carrying, or transporting a handgun within the confines of a business establishment in which he is employed during such time as he is acting in the course of his employment and has been authorized to wear, carry, or transport the handgun by the owner or manager of the busness establishment.

(d) Unlawful use of handgun in commission of crime. -- Any person who shall use a handgun in the commission of any felony or any crime of violence as defined in § 441 of this article, shall be guilty of a separate misdemeanor and on conviction thereof shall, in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor, be sentenced to the Maryland Division of Correction for a term of not less than five nor more than fifteen years, and it is mandatory upon the court to impose no less than the minimum sentence of five years.

(e) Reduction or suspension of mandatory minimum sentence; probation. -- Notwithstanding any other provision of law to the contrary, including the provisions of § 643 of this Article, (1) except with respect to a sentence prescribed in subsection (b)(i) hereof, no court shall enter a judgment for less than the mandatory minimum sentence prescribed in this subheading in those cases for which a mandatory minimum sentence is specified in this subheading; (2) except with respect to a sentence prescribed in subsection (b)(i) hereof, no court shall suspend a mandatory minimum sentence prescribed in this subheading; (3) except with respect to a sentence prescribed in subsection (b)(i) hereof for wearing, carrying, or transporting a handgun in violation of § 36B other than on public school property, no court shall enter a judgment of probation before or without verdict with respect to any case arising under this subheading; and (4) except with respect to a sentence prescribed in subsection (b)(i)

hereof no court shall enter a judgment of probation after verdict with respect to any case arising under this subheading which would have the effect of reducing the actual period of imprisonment prescribed in this subheading as a mandatory minimum sentence.

MD. CODE ANN., Art. 27, § 486 (1976) provides:

§486. Robbery -- In general.

Every person convicted of the crime of robbery, or as accessory thereto before the fact, shall restrore the thing robbed or taken to the owner, or shall pay to him the full value thereof, and be sentenced to the penitentiary for not less than three nor more than ten years.

MD. CODE ANN., Art. 27, § 488 (1976) provides:

§488. Robbery with deadly weapon.

Every person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon or accessory thereto, shall restore to the owner thereof the thing robbed or taken, or shall pay him the full value thereof, and be sentenced to imprisonment in the Maryland Penitentiary for not more than twenty years.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

APPENDIX D

Opinion of Delaware Supreme Court

Hunter v. State, Delaware Supreme Court, No. 215, 1978, filed June 24, 1980

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SARA C. HUNTER, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	§ § § § § § § § § § § §	No. 215, 1978

Submitted: October 16, 1979
Decided: March 14, 1980

Submitted on Motion for Reargument: May 27, 1980
Decided on Motion for Reargument: June 24, 1980

Before HERRMANN, Chief Justice, and DUFFY, McNEILLY, QUILLEN, and HORSEY, Justices, constituting the Court en Banc.

Upon appeal from Superior Court. Affirmed as to convictions; sentences set aside and remanded for resentence.

Richard E. Fairbanks, Jr. and Edward C. Pankowski, Jr., Assistant Public Defenders, Wilmington, for defendant below-appellant.

Bartholomew J. Dalton and Charles M. Oberly, III, Deputy Attorneys General, Wilmington, for plaintiff below-appellee.

HERRMANN, Chief Justice:

On this appeal, we are required to decide, inter alia, whether the defendant Sara C. Hunter may be sentenced cumulatively upon convictions in one trial of: (1) Assault in the First Degree, in violation of 11 Del.C. § 613 (1)*; and (2) Possession of a Deadly Weapon During the Commission of a Felony, in violation of 11 Del.C. § 1447.**

---

* 11 Del.C. § 613 provides:

"§ 613. Assault in the first degree; class B felony.

"A person is guilty of assault in the first degree when:

"(1) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

"(2) He intentionally disfigures another person seriously and permanently, or intentionally destroys, amputates or disables permanently a member or organ of another person's body; or

"(3) He recklessly engages in conduct which creates a substantial risk of death to another person, and thereby causes serious physical injury to another person; or

"(4) In the course of or in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he intentionally or recklessly causes serious physical injury to another person; or

"(5) He intentionally causes serious physical injury to a law enforcement officer who is acting in the lawful performance of his duty.

"Assault in the first degree is a class B felony. (11 Del.C. 1953, § 613; 58 Del. Laws, c. 497, §1.)"

The term "serious physical injury" is defined as including injury "which creates a substantial risk of death or which creates serious and prolonged disfigurement." 11 Del.C. § 222 (20).

For a Class B felony, the term of imprisonment which the Court may impose is set by Statute "from 3 to 30 years and such fine or other conditions as the Court may order." 11 Del.C. § 4205 (b)(2).

** 11 Del.C. § 1447 provides:

"§ 1447. Possession of a deadly weapon during commission of a felony; class B felony.

(cont'd)

I.

The defendant was indicted upon two counts: Count I charged violation * of § 613 and Count II charged violation of § 1447. ** Upon her conviction in a

(continued)

"(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

"Possession of a deadly weapon during commission of a felony is a class B felony.

"(b) Notwithstanding § 4205 of this title, the minimum sentence for a violation of this section shall be not less than 5 years which minimum sentence shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for parole or probation during such 5 years.

"(c) Any sentence imposed upon conviction for possession of a deadly weapon during the commission of a felony shall not run concurrently with any other sentence. In any instance where a person is convicted of a felony, together with a conviction for the possession of a deadly weapon during the commission of such felony, such person shall serve the sentence for the felony itself before beginning the sentence imposed for possession of a deadly weapon during such felony.

"(d) Every person charged under this section over the age of 16 years shall be tried as an adult, notwithstanding any contrary provision of statutes governing the Family Court or any other state law.

"(e) A person may be found guilty of violating this section notwithstanding that the felony for which he is convicted and during which he possessed the deadly weapon is a lesser included felony of the one originally charged. (11 Del.C. 1953, § 1447; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c 203, § 34; 59 Del. Laws, c. 547, § 15; 60 Del. Laws, c. 306, §§ 1, 2.)

*

Count I charged Assault First Degree in violation of 11 Del.C. § 613, in that the defendant "did intentionally cause serious physical injury to Terry Mutler by means of a deadly weapon, to wit: did slash Terry Mutler with a kitchen carving knife, thereby causing serious physical injury." [Specifically, this was a prosecution under § 613 (1)].

**

Count II charged Possession of a Deadly Weapon during the Commission of a Felony in violation of 11 Del.C. § 1447, in that the defendant "did knowingly possess a deadly weapon, to wit: a kitchen carving knife, during the commission of Assault First Degree as set forth in Count I of this Indictment which is incorporated herein by reference."

single trial on both Counts, the defendant was sentenced to incarceration for a period of 10 years — 5 years on the § 613 (1) conviction and 5 years on the § 1447 conviction, to run consecutively. Later, pursuant to a motion for reduction of sentence, the sentence on the § 613 (1) conviction was changed to probation for 5 years commencing upon the termination of the minimum 5 year term of incarceration mandated by the Statute for the § 1447 conviction. The defendant attacks the convictions on various grounds, and the § 1447 conviction and sentence especially upon the basis of Davis v. State, Del.Supr., 400 A.2d 292 (1979).

II.

The basic facts will be stated as generally and briefly as possible: other facts, relevant to specific grounds of the appeal, will be detailed in the discussion of the specific contentions.

The charges against the defendant arose out of an altercation that occurred at the defendant's apartment. The victim testified that she had been requested by her cousin to go to the defendant's house to settle a difference between the cousin and the defendant. After an argument at the doorway to the defendant's apartment, according to the victim's testimony, the defendant jumped out of the doorway, threatened to kill her, and stabbed her with a knife causing cuts requiring over 150 stitches, including lacerations of the face, breast, arms and back, and a 4 inch stab under the shoulder blade. On the other hand, the defendant testified that, while still inside her doorway, she was cut by the victim with a knife before she stabbed the victim in self-defense. There was evidence that the victim

had been drinking during the day in question which, according to the self-defense position of the defendant, resulted in the victim's being intoxicated at the time of the altercation.

III.

Disposing first of the defendant's assertions of reversible errors in the trial as follows:

First, the defendant contends that the Trial Court committed error in admitting into evidence a photograph showing the victim a short time after the stabbing, bandaged after emergency treatment, sitting in a wheel chair. The evidence was objected to as irrelevant, unduly prejudicial, and inflammatory. We find no abuse of discretion by the Trial Court in the admission of the photograph. Shantz v. State, Del.Supr., 344 A.2d 245 (1975).

Secondly, the defendant contends that the Trial Court committed reversible error in refusing to allow either testimony by an expert witness as to the blood alcohol content of the victim or by failing to instruct the jury under 21 Del.C. § 4177 (a).* We find no error in this connection in view of the facts that the jury heard testimony that the victim's blood alcohol count was .10% and perhaps higher, and that there was no request for an instruction under § 4177 (a).

---

* 21 Del.C. § 4177 (a) pertains to the offense of operating a vehicle while under the influence of intoxicating liquor and contains the following provision:

> "Any person who drives, operates or has in actual physical control a vehicle while such person's blood has reached a blood alcohol concentration of one tenth of 1% or more by weight as shown by a chemical analysis of a blood, breath or urine sample taken within 4 hours of the alleged offense shall be guilty under this section."

Finally, in her general attacks upon the convictions, the defendant argues that the prosecutor's remark in his rebuttal summation regarding "prior conviction" falsely implied that the defendant had a previous conviction and was so prejudicial as to require reversal. We find no merit in this contention.

In its closing argument the defense stated:

> "The only two episodes of violence that you have heard about Sara Hunter, who has never been convicted of a felony, a mother of five was the episode four to six weeks before this one."

In his rebuttal summation, the prosecutor stated:

> "Don't let someone who may have a prior conviction be convicted on less evidence than someone who doesn't have a prior conviction. The evidence required for each person is the same. They stand new in front of the law every time they stand up here."

There has been no showing of error in the trial to justify a new trial.

IV.

Turning now to the more difficult question of whether the conviction and sentence on the felony-weapon possession charge under § 1447 may stand in the light of Davis, our conclusion is that Davis does not apply in this case.

The Davis case involved convictions for Attempted Robbery in the First Degree under 11 Del.C. § 832* and Possession of a Deadly Weapon During the Commission of a Felony under § 1447; a separate sentence was

---

*"§ 832. Robbery in the first degree.

"(a) A person is guilty of robbery in the first degree when he commits the crime of robbery in the second degree and when, in the course of the

 (cont'd)

imposed on each charge. In Davis, this Court followed the example of Simpson v. United States, 435 U.S. 6, 11-12, 98 S.Ct. 909, 913, 55 L. Ed. 2d 70, 76 (1978): before examination to determine whether cumulative punishments for two statutory offenses are constitutionally permissible, it is necessary, following the policy of avoiding constitutional decisions when possible, to determine whether the Legislature intended to subject the defendant to multiple penalties for the single criminal transaction in which she engaged. After analyzing and comparing the elements of § 832 (a)(2) and § 1447, this Court concluded in Davis that "as to armed robbery, the General Assembly has defined two indistinguishable crimes and that it intended to replace the weapons statute, § 1447, with the special aggravated crime of first-degree robbery, § 832".

The Davis approach does not govern the instant case because the Assault First Degree Statute, § 613, lacks the statutory history of the

(continued)

commission of the crime or of immediate flight therefrom, he or another participant in the crime:

"(1) Causes physical injury to any person who is not a participant in the crime; or

"(2) Displays what appears to be a deadly weapon; or

"(3) Is armed with and uses or threatens the use of a dangerous instrument.

"Robbery in the first degree is a class B felony.

"(b) Notwithstanding §§ 4205 (b)(2) and 4215 of this title, a person convicted a second or subsequent time for robbery in the first degree shall be sentenced to a term of imprisonment for not less than 10 nor more than 30 years and the court shall not suspend the sentence of such person, nor give such person a probationary sentence, nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment imposed for the commission of such offense.

"(c) The minimum sentence of imprisonment required by this section and § 4205 of this title for a first offense shall not be subject to suspension, and no person convicted under this section shall be eligible for probation or parole during the first 3 years of such sentence. (11 Del.C. 1953, § 832; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 547, § 6; 60 Del. Laws, c. 240, §§ 1,2.)

Robbery Statute, § 832, as outlined in Davis, and because § 613 lacks any "built-in" enhancement-of-punishment provision comparable to § 832 (c). Moreover, unlike the Robbery Statute § 832 (a)(2) in its relationship to § 1447 which arises out of the mere "display" of a deadly weapon, by the three Assault Statutes the General Assembly seeks to enhance punishment more for the perpetrator's state of mind and the seriousness of the injury than for the possession of the deadly weapon used. The Assault in the Third Degree Statute [11 Del.C. § 611 (2)] proscribes the infliction by means of a deadly weapon of physical injury with criminal negligence; violation of § 611 (2) is a misdemeanor. The Assault in the Second Degree Statute [11 Del.C. §§ 612 (2) and (3)] proscribes the infliction by means of a deadly weapon of physical injury intentionally, or of serious physical injury recklessly; violation of either of these sections is a class C felony. Finally, the Assault in the First Degree Statute [11 Del.C. § 613 (1)] proscribes the infliction by means of a deadly weapon of serious physical injury intentionally; violation of § 613 (1) is a class B felony. There is no enhanced punishment by reason of the possession of a deadly weapon built into the Assault Statutes. Clearly, therefore, it cannot be said, as in Davis regarding § 832 (a)(2), that the purpose and effect of § 613 (1) is the same as § 1447.

Accordingly, we hold that the Davis case is inapposite and that, therefore, the § 1447 conviction and sentence in the instant case do not fall by reason thereof.

V.

A.

But that conclusion may not be permitted to end the matter. Cases in which the State "is able to prove violations of two separate criminal

statutes with the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the Blockburger* test." Simpson v. United States, supra, 435 U.S. at 11, 98 S.Ct. at 912, 55 L.Ed.2d at 76.

Before entering into an examination of whether cumulative punishments for the two offenses under § 613 (1) and § 1447 are constitutionally permissible, just as in Davis we considered preliminarily the question of whether the General Assembly intended to subject the defendant to multiple penalties for the single criminal act in which she engaged. It is our conclusion that such was the legislative intent. There is no statutory history to the contrary; and the two Statutes are clear and unambiguous, leaving no room for the application of rules of statutory construction. Compare Simpson v. United States, supra. "There is nothing anywhere in the pertinent Statutes to suggest that one statutory offense was intended to be deprived of its status as the basis for prosecution by reason of its relationship to another offense. Indeed, the clear purpose and intent of the Felon's Firearm Possession Act [§ 1447] is to the contrary." State v. Honie, Del.Supr., 310 A.2d 872, 874 (1973).**

For these reasons and the reasons stated in Part IV hereof, we conclude that § 1447 creates an offense distinct from the underlying § 613 (1)

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* Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

** The portions of Honie (310 A.2d at 874) dealing with discretionary sentencing — within the limits of the proscription that "double punishment for substantially the same offense is impermissible in the eyes of the law" — have become outmoded and superseded by the subsequent amendments of § 1447, explicitly prohibiting concurrent sentencing and requiring that any sentence for the underlying felony be served prior to the mandatory term for possession of a deadly weapon. See 60 Del.L. ch. 306, 308.

felony of Assault First Degree, and that it was the legislative intent to subject this defendant to multiple penalties for the single criminal act in which she engaged. Accordingly, in this case we reach the constitutional double jeopardy issue and the need to evaluate § 613 (1) and § 1447 in the light of the Blockburger test.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Delaware Constitution, Art. I, § 8, similarly provides that no person shall be twice put in jeopardy "for the same offense". We have little helpful case law under the State Constitutional provision, see e.g., State v. Turner, Del.Supr., 168 A.2d 539 (1961); State v. Hamilton, Del.Super., 318 A.2d 624 (1974); but there are several recent helpful pronouncements on the subject by the United States Supreme Court.

The double jeopardy guarantee "serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Brown v. Ohio, 431 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 193 (1977). "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for 'the same offense'," Jeffers v. United States, 432 U.S. 137, 150, 97 S.Ct. 2207,

2216, 53 L. Ed. 2d 168, 180 (1977), and protection "against multiple punishment for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L. Ed. 2d 656, 665 (1969).

In Blockburger, the Supreme Court set out the test for determining "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." Brown v. Ohio, supra, 431 U.S. at 166, 97 S.Ct. at 2225, 53 L. Ed. 2d at 194. It there held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, supra, 284 U.S. at 304, 57 S.Ct. at 182, 76 L. Ed. 2d at 309. "The Blockburger test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately defined crimes constitute the 'same offense' for double jeopardy purposes." Simpson v. United States, supra, 435 U.S. at 11, 98 S.Ct. at 912, 55 L. Ed. 2d at 76. The test emphasizes the elements of the two offenses. "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the offenses." Iannelli v. United States, 420 U.S. 770, 785, 95 S.Ct. 1284, 1294, 43 L. Ed. 2d 616, 627, n. 17 (1975).

* * *

In the instant case, it is clear that the Blockburger test has not been satisfied and that multiple punishments for the "same offense" have been imposed. Section 1447 required proof of no fact not required by § 613 (1).

The elements required to be proved under Count I and Count II of the Indictment were identical: Under Count I, the State, to obtain a conviction for Assault in the First Degree, was required to prove that defendant intentionally caused serious physical injury to another person by means of a deadly weapon. Under Count II, the State was compelled to prove the possession of the deadly weapon as well as all the elements of the underlying felony, Assault in the First Degree, as alleged in Count I. Compare United States v. Busic, (3 Cir.), 587 F.2d 577 (1978). For double jeopardy purposes, the two offenses are undoubtedly "the same".

B.

But that does not mean that the two convictions under the two Counts of the Indictment may not stand. The Double Jeopardy Clause prohibits "multiple prosecutions" for the same offense, Jeffers v. United States, 432 U.S. 137, 150-151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977). Since the crux of this constitutional proscription lies in the ordeal of multiple trials and multiple punishment for the same offense, North Carolina v. Pearce, supra, 89 S.Ct. at 2089, dual indictments and dual convictions in a single, simultaneous prosecution for an act which amounts to the same offense under separate statutes do not violate the Double Jeopardy Clause. See United States v. McDaniel, U.S. App. D.C., 538 F.2d 408 (1976); United States v. Redman, (D.Del.) 470 F.Supp. 50 (1979); United States v. Hearst, (N.D.Calif.), 412 F.Supp. 877 (1976). See also

Simpson v. United States, supra; United States v. Busic, (3 Cir.), 587 F.2d 577 (1978); but cf. United States v. Eagle, (8 Cir.) 539 F.2d 1166 (1976). It is only when, as here, multiple punishments are imposed upon such dual convictions under statutes that proscribe the same offense that the spectre of constitutional violations arise.

In addition to the federal double jeopardy authorities, it is settled in this jurisdiction that a weapon-possession charge under § 1447, set out in the indictment separately from the underlying offense, as here, will support a separate conviction under § 1447. Mackie v. State, Del.Supr., 384 A.2d 625 (1978).*

* * *

Accordingly, both convictions are affirmed.

C.

Since the cumulative sentences imposed by the Trial Court in the instant case may not stand, there must be a remand for resentencing. Under the conclusions reached herein, the case returns under the remand with both convictions intact. Adopting the practice of the Third Circuit Court of Appeals on the remand of this case for resentencing, we direct that the State shall have the election to proceed under either § 613 or § 1447, but not both. See United States v. Busic, supra, 587 F.2d at 589.

The practice of allowing such prosecutorial choice, without regard for the "rule of lenity", is in accord with recent pronouncements of the United States Supreme Court, United States v. Batchelder, ____ U.S.

* In Mackie, this Court construed 11 Del.C. § 206 and held that a conviction upon a separate charge under § 1447 does not constitute a prohibited dual conviction of a lesser included offense under § 206 (b).

_____, 99 S.Ct. 2198 (1979), involving two statutes that contained overlapping provisions prohibiting convicted felons from receiving firearms, but each authorizing different maximum penalties. The Court there stated:

> "This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. * * *. Whether to prosecute and what charge to file or bring * * * are decisions that generally rest in the prosecutor's discretion. * * *. [T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. * * * The prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone does not give rise to a violation of the Equal Protection or Due Process Clauses. * * * Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced. * * *." 99 S.Ct. at 2204-5.

* * *

Affirmed as to the convictions. The sentences are set aside and the cause remanded for further proceedings consistent with this opinion.

QUILLEN, Justice, concurring:

There is no more confusing area of criminal and constitutional law than the issue of double jeopardy and the related problems of statutory interpretation. The majority opinion tackles the thicket directly and clearly. I think the result is constitutionally mandated under current standards. But the opinion also is limited in the customary sound tradition of judicial restraint in that it considers only the instant appeal. My fear is that the limited, and isolated, case by case, subsection by subsection, approach may, in this area, be counterproductive in light of a general purpose of the Code "[t]o differentiate upon reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor". 11 Del.C. § 201 (4). I therefore express my concern briefly and suggest uncharacteristically that we should at least attempt to take a broader sweep in an effort to assure a more orderly and more rational administration of the penal provisions as a whole.

The appeal in this case raises a question factually akin to that faced by this Court in Davis v. State, Del.Supr., 400 A.2d 292 (1979) and Bey v. State, Del.Supr., 402 A.2d 362 (1979). In those cases, as a matter of statutory construction, this Court determined that, "[w]hen it is alleged that a robber displayed a deadly weapon", the General Assembly "intended to replace the weapons statute, § 1447, with the special aggravated crime of first-degree robbery, § 832". Davis v. State, supra, 400 A.2d 296, 297; 11 Del.C. § 832 (a)(2), § 1447.

For purposes of the point of this separate opinion, it is not necessary to further complicate the issues by considering that Davis involved attempted robbery. But see Smith v. State, Del.Supr., _____ A.2d _____ (1980).

Thus, the convictions under § 1447 were reversed.

In the present case, the Court determines that convictions for assault in the first degree under 11 Del.C. § 613 (1) and for possession of a deadly weapon during the commission of a felony under 11 Del.C. § 1447 can stand. But the Court also holds that the defendant cannot be subjected to two sentences on the dual convictions due to the constitutional limitation of double jeopardy which proscribes multiple punishments for the same offense. Thus, the case is remanded for resentence on one of the convictions with the selection at the State's option.

The opinion in the instant case decides the following points with which I am in agreement: there is nothing to suggest that the General Assembly intended that either statute was to be deprived of its status as a basis of prosecution due to its relation to the other; both convictions can withstand constitutional attack; there can be but one sentence due to constitutional limitations of double jeopardy (a point conceded by the State at oral argument); and resentencing should be on the conviction the State elects.

But, because the Davis case has been urged by the defense as a ground for reversal and because it is frequently difficult in an isolated case to appreciate the impact of a decision on the general administration of the codified law and because the disposition here leaves two viable approaches in similar situations with serious anomalous results, I think the State court of last resort, sitting en banc, with judicial responsibility for uniformity in criminal law interpretation, should, as urged by

the State, reconsider Davis on its merits in this appeal. For this reason, I merely concur in the decision of the Court by this separate opinion.

* * *

UPON MOTION FOR REARGUMENT AND CLARIFICATION

Submitted: May 27, 1980
Decided: June 24, 1980

HERRMANN, Chief Justice (for the majority):

Subsequent to the publication of the foregoing opinions on March 14, 1980, this Court received a motion by the defendant for reargument and clarification of the opinion on the issue of resentencing in the light of Davis.[**]

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[*] In this area of the law, it is doubtful that all anomaly can be eliminated. But anomalous results created by statutory interpretation, as in Davis, should give one pause and cause one to question whether the results were truly legislatively intended.

[**] In Davis this Court stated:

"Because we have determined that § 832 is indistinguishable from and has replaced § 1447 in cases of armed robbery, defendant's conviction under the weapons statute cannot stand. His conviction for attempted first-degree robbery remains, however, and the case will be remanded to Superior Court for resentencing on that charge. At resentencing, the Trial Judge will not be limited to the mandatory minimum sentence imposed initially for the attempted robbery conviction, but the sentence may not exceed the combined duration of the two terms imposed before this appeal. This limitation appears to comply with the requirements imposed by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)." 400 A.2d at 292.

On April 16, 1980, and before this Court acted upon the defendant's motion, the United States Supreme Court decided the case of Whalen v. United States _____ U.S. _____ 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). In view of the apparent conflict between the foregoing opinion and Whalen, this Court, sua sponte, requested additional memoranda from the parties concerning the effect of Whalen on the conclusions reached in the foregoing opinion.

I.

We take up first the effect of Whalen. That case involved an appeal from convictions in the District of Columbia for the crimes of rape and felony murder based on the rape. The defendant in that case contended that the two felonies merged for the purposes of punishment and that cumulative punishment for these crimes violated the Double Jeopardy Clause of the Fifth Amendment. Finding that the Double Jeopardy Clause in cumulative punishment cases involves at a minimum a determination of legislative intent,the Court stated:

> "The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress. . . . If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."

100 S.Ct. at 436-437, 63 L.Ed.2d at 722 (citations omitted). It then concluded, on the basis of legislative history and the policy of lenity, that Congress did

not intend to punish doubly and, therefore, reversed the Court of Appeals decision affirming the consecutive sentences.

The State contends that Whalen mandates that our foregoing opinion in this case be withdrawn. The State argues that in cumulative punishment cases the bounds of the Double Jeopardy Clause are defined and controlled by the will of the legislature.* The defendant, on the other hand, contends that Whalen is distinguishable from this case and that the foregoing opinion should stand. We agree.

Before reaching the substance of the matter, we are compelled to note that increasing uncertainty exists in this area of the law, resulting from the somewhat ambiguous and to us, at least, puzzling pronouncements in recent United States Supreme Court cases. Compare Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978); Whalen v. United States, _____ U.S. _____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); Busic v. United States, _____ U.S. _____, _____ S.Ct. _____, 48 U.S.L.W. 4535 (1980). We are not alone in this posture. See e.g. People v. Hughes, Mich. Ct. App., 272 N.W.2d 567 (1978); Western & Drubel, Toward a General Theory of Double Jeopardy, 1978 SUPREME COURT REV. 81, 113. We thought the Supreme Court cases, and quotations therefrom, cited in the foregoing opinion in this case, constituted settled law on the subject of double jeopardy. But the Court's recent majority decision in Whalen seems to have added a new and, perhaps, contrary analysis structure to cumulative punishment cases without any

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* This is a view apparently shared by Justices Blackmun and Rehnquist. See 100 S.Ct. at 1441, 1443, 63 L.Ed.2d at 726, 728. See also Busic v. United States, 48 U.S.L.W. 4535, 4540, 4541 (1980).

attempt to clarify, distinguish, or overrule its prior decisions upon the basis of which the foregoing opinion was formulated.* It is within this vacuum that we are asked to decide the effect of Whalen on the instant case.

We distinguish Whalen. That case concluded that Congress had not intended to punish doubly for the crimes of rape and felony murder. Thus, the analysis stopped with the determination that the District of Columbia Court of Appeals had exceeded its legislative authorization in affirming consecutive sentences. On the other hand, our analysis here does not terminate but, in fact, only begins with a determination of the legislative intent behind § 613 and § 1447. We are presented with a question wholly different than that posed in Whalen. There, the concern was the scope of the Double Jeopardy Clause when cumulative punishment for the identical crime is imposed contrary to the intent of the Congress. Here, we are confronted with the question of the scope of the Double Jeopardy Clause when cumulative punishment is meted out for the "same offense" consistent with the will of

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* For example, Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L. Ed.2d 70 (1978) declared that "[b]efore an examination is made to determine whether cumulative punishments are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single transaction in which he engaged. 98 S.Ct. at 913. Whalen concluded, however, that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." 100 S.Ct. at 1426, 63 L.Ed.2d at 721. On the basis of the later holding in Whalen it might be argued that the procedural analysis in Simpson has been impliedly overruled, c.f. Busic v. United States, 48 U.S.L.W. 4535, 4541 (1980) (Rehnquist, J. dissenting), Simpson however has recently been reaffirmed. Busic v. United States, supra.

For other contradictory conclusions compare the language in Whalen with that of the decisions cited in the foregoing opinion in the instant case.

the General Assembly. In view of this governing distinction, we cannot apply to this case certain conclusions and statements in the various opinions in Whalen which we find ambiguous, to say the least, when read in the light of previous opinions of the Supreme Court which it has not renounced.

The guarantee of the Double Jeopardy Clause existed long before it was institutionalized in the Fifth Amendment. It arose to prominence to mitigate the harshness and severity of the punishment prescribed for the various common-law felonies and as a means to diminish "the danger of governmental tyranny." Sigler, A History of Double Jeopardy, 7 Am. Jur. L. Hist. 283, 293, n. 57 (1963); Note, 57 Yale L.J. 132, 133 (1947). While at common law the protection was limited to the pleas of autrefois attaint (former pardon), autrefois convict (former conviction), and autrefois acquit (former acquittal), which protected against multiple prosecutions, the protection against multiple punishment was recognized early on in this country. In Ex Parte Lange, 85 U.S. (18 Wall) 163, 21 L. Ed. 872 (1873), it was stated:

> "If we reflect that, at the time this maxim came into existence, almost every offense was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes, and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.
>
> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that

> would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?
>
> "The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

This protection was recently reaffirmed in North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 655 (1969).

The primary responsibility for safeguarding this protection, as with any of the constitutional mandates, lies with the Judiciary. This fundamental principle has existed unquestioned since the birth of our federal system.

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> 'So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-178, 2 L.Ed. 60, 73-74 (1803). To accept the State's contentions regarding the bounds of the Double Jeopardy Clause would require this Court to abdicate its constitutional responsibility and remove from our fundamental system of checks and balances the most

effective limitation on legislative power — judicial review.

It is argued that the differences between punishment for the same offense via the vehicle of two statutes and enhanced punishment by one statute, which is clearly constitutional, is illusory. We disagree. Punishment for the same offense via two separate statutes does more than merely cumulate punishment for that one offense. It has profound collateral effects on parole considerations, future treatment as an habitual offender, and may lead to harsher sentences for later offenses. See Schwartz, Multiple Punishment for the "Same Offense": Michigan Grapples with the Definitional Problem, 25 Wayne L. Rev. 825 (1979). These differences are hardly illusory.

Moreover, if the aegis of the Double Jeopardy Clause in this substantive area extends only to acts of prosecutors and courts, 100 S.Ct. at 1441 (Blackmun, J. concurring) may this not have a "spillover" effect into multiple prosecution cases? Can the Legislature specifically negate the application of the rule of collateral estoppel, since it apparently was intended to protect against abuses in prosecutorial discretion? See Ashe v. Swenson, 397 U.S. 436, 445, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469, 476 n. 10 (1970). Since it may punish doubly in one trial, can the Legislature require multiple trials for various charges arising from the same offense? And if the Legislature may impose double punishment for the same offense, why not triple or quadruple punishment for the same offense?

We are of the opinion that the Double Jeopardy Clause was intended to prevent double punishment regardless of the procedural context in which it is found. We can find no sound basis, in Whalen or elsewhere, to exempt

the Legislature from adherence to this constitutional doctrine in the instant case. Multiple sentences in the same trial for the same act are equally as abhorrent to the constitutional guarantee, in our view, as multiple sentences for the same act resulting from multiple trials.

We are not convinced that Whalen controls the instant case in view of the ambiguities contained therein which we find in unexplained conflict with prior double jeopardy principles which we thought settled. We are unwilling to abandon those principles until the United States Supreme Court has more clearly and definitely abandoned them.*

Nevertheless, the fact that we have found Whalen to be distinguishable does not lessen its effect on our construction of the Blockburger rule. In the foregoing opinion, we concluded that the Blockburger rule was a rule of substantive law for determining whether two statutes proscribed the "same offense" for double jeopardy purposes. This, we thought, was consistent with the great weight of authority on this subject. Compare Hunter with Simpson v. United States, supra; Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); and Gavieres v. United States, 220 U.S. 338, 31

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* Certainly Article I, § 8 of the Delaware Constitution, which states that "no person shall be for the same offense twice put in jeopardy of life and limb ...", and Article I, § 7, which provides that "[i]n all criminal prosecutions... the accused ... shall not ... be deprived of life, liberty or property, unless by the law of the land", would have application in cumulative punishment cases such as this. Because of the construction we have placed on the federal constitutional provisions, however, we need not decide the scope of these provisions at this time.

S.Ct. 421, 55 L.Ed.2d 489 (1911). In Whalen, however, the Supreme Court has declared that the rule enunciated in Blockburger is not a substantive rule of law; rather it is "a rule of statutory construction", 100 S.Ct. at 1438.

While the reasons for this somewhat sudden shift in emphasis are obscure we are, nevertheless, bound to follow the Supreme Court's construction of its own case law. That does not mean, however, that we may not adopt a Blockburger-like rule of substantive law to determine when two sentences constitute punishment for the "same offense". Indeed, we note that the rule in Blockburger was drawn from a rule of substantive law for determining whether punishment for the "same offense" in multiple prosecution situations violates the principles of double jeopardy. See Morey v. Commonwealth, Mass.Supr., 108 Mass. 433 (1871); Commonwealth v. Robey, Mass.Supr., 12 Pickerings Rep. 496 (1832); People v. Goodwin, N.Y.Supr., 18 John's R 187 (1820). Compare 11 Del.C. § 208 (1)(b)(1). We therefore conclude that multiple sentences at the same trial may not be had unless the required statutory elements of proof for each offense contains an element that the other does not.

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* 11 Del.C. § 208 (1)(b)(1) states:

"§ 208. When prosecution is barred by former prosecution for different offense.

"Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution in a court having jurisdiction over the subject matter of the second prosecution under the following circumstances:

"(1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in § 207 of this title and the subsequent prosecution is for:

"b. The same conduct, unless:

"1. The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil, or

***."

II.

Turning now to the motion for clarification regarding the proper resentencing procedures to be adopted under the foregoing opinion in the light of the above quoted statements in Davis:

As to the sentencing procedures under Davis (and Bey v. State, Del. Supr., 402 A.2d 362 (1979), they do not apply to a Hunter case. We distinguished Davis for prosecutorial purposes and it is also different from Hunter for sentencing purposes.

In Davis, we held that 'defendant's conviction under the weapons statute [§ 1447] cannot stand," 400 A.2d at 297; here, however, the § 1447 conviction does stand and, indeed, it is affirmed as part of our ruling in this appeal. In Davis, only the 'conviction for attempted first-degree robbery remain[ed]." 400 A.2d at 297, and the case was remanded for resentencing on that charge. And since that was the one conviction which remained, obviously it was the only basis on which a sentence could be imposed. But in Hunter, we have determined that both convictions remain and the State has an election on whether to proceed under § 613 or § 1447 (but not both).

The arguments have, however, identified one modification which should be made to a Davis-type sentencing procedure, and it is appropriate to make it here. In Davis we held that:

> "At resentencing, the Trial Judge will not be limited to the mandatory minimum sentence imposed initially for the attempted robbery conviction, but the sentence may not exceed the combined duration of the two terms imposed before this appeal. This limitation appears to comply

> with the requirements imposed by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)."

400 A.2d 297.

In North Carolina v. Pearce, the United States Supreme Court held that the power of the State to resentence a defendant to an increased term over that originally imposed, without contravening the guaranty against double jeopardy, arises only when the defendant's original conviction and sentence have been "nullified," and a second conviction following a retrial has been obtained. We are now persuaded that such circumstances are so factually and legally different from those found in a Davis-type case that Pearce does not provide a useful guide in the sentencing process.

The proper rule to apply is the one which prohibits increasing a sentence after a defendant has commenced to serve it. In United States v. Turner, 7 Cir., 518 F.2d 14 (1975), the Court said:

> "The law is well settled that increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against double jeopardy. [citations omitted]"

Compare Chandler v. United States, 5 Cir., 468 F.2d 834 (1972); United States v. Welty, 3 Cir., 426 F.2d 615 (1970); United States v. Adams, 6 Cir., 362 F.2d 210 (1966); Commonwealth v. Brown, Pa.Supr., 314 A.2d 506 (1974); 4 Wharton's Criminal Procedure (12 ed.) § 611.

Thus, any post-appeal sentence imposed in a Davis-type case may not exceed the sentence originally imposed for the conviction which remains, if the defendant has begun to serve the sentence. Any ruling to the contrary in the Davis opinion is abandoned.

* * *

MCNEILLY, Justice (concurring in part; dissenting in part):

I concur in Part II of the Court's foregoing Opinion on the Motion for Reargument and Clarification. Otherwise, I join in the following dissenting opinion of Justice Quillen.

* * *

QUILLEN, Justice, dissenting:

There is no more confusing area of criminal and constitutional law than the issue of double jeopardy and the related problems of statutory construction. The majority opinion tackles the thicket boldly and I depart from the views it expresses with respect. At the time of the original decision in this case on March 14, 1980, I expressed the view that the result reached by the opinion of the Chief Justice on behalf of the Court "[was] constitutionally mandated under current standards." I now find it necessary to withdraw that concurring opinion and to take a most hesitant different view from that of the majority in light of the recent decision of the United States Supreme Court in Whalen v. U.S., ____ U.S. ____, 100 S.Ct. 1432, ___ L.Ed.2d ____ (1980). I enter the fray hesitantly because, unlike Mr. Justice Rehnquist, I find the double jeopardy opinions of his Court far from clear.*

*Justice Rehnquist summarized Whalen on double jeopardy in the following manner: "[S]ix Members of this Court held that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy....Three other Members of this Court, including myself, argued that the permissibility of cumulative punishments in the same criminal proceeding presented no double-jeopardy question whatsoever." Busic v. United States, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (1980). Not surprisingly, his summary conclusions lean as strongly as possible to his own point of view on the merits.

I

Initially, I am still troubled by the restricted approach taken by the majority in this case. The opinion is limited in that it considers in isolation only the statutory sections involved in the instant appeal. My fear is that the limited and isolated, subsection by subsection, approach may, in this area, be counterproductive in light of a general purpose of the Code "[t]o differentiate upon reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor." 11 Del.C. § 201(4). I therefore express concern and suggest that we, perhaps uncharacteristically, should at least attempt to take a broader sweep in an effort to assure a more orderly and more rational administration of the penal provisions as a whole.

Specifically, the appeal in this case raises a question factually akin to that faced by this Court in Davis v. State, Del.Supr., 400 A.2d 292 (1979) and Bey v. State, Del.Supr., 402 A.2d 362 (1979). In those cases, as a matter of statutory construction, this Court determined that, "[w]hen it is alleged that a robber displayed a deadly weapon", the General Assembly "intended to replace the weapons statute, § 1447, with the special aggravated crime of first-degree robbery, § 832". Davis v. State, supra, 400 A.2d 296, 297; 11 Del.C. § 832(a)(2), § 1447.* Thus, the convictions under

*For present purposes it is not necessary to further complicate the issues by considering that Davis involved attempted robbery. But see Smith v. State, Del.Supr., 412 A.2d 331 (1980).

§ 1447 were reversed.

In the present case, the Court determines that convictions for assault in the first degree under 11 Del.C. § 613(1) and for possession of a deadly weapon during the commission of a felony under 11 Del.C. § 1447 can stand. But the Court also holds that the defendant cannot be subjected to two sentences on the dual convictions due to the constitutional limitation of double jeopardy which proscribes multiple punishments for the same offense. Thus, the case is remanded for resentence on one of the convictions with the selection at the State's option.

I agree there is nothing to suggest that the General Assembly intended that either statute was to be deprived of its status as a basis of prosecution due to its relation to the other and that both convictions can withstand constitutional attack. But, even accepting arguendo the conclusion of the majority as to double jeopardy and resentencing, I do not think Davis should be ignored. I note that: the Davis case has been urged by the defense as a ground for reversal; it is frequently difficult in an isolated case to appreciate the impact of a decision on the general administration of the codified law; and the disposition here leaves two viable approaches in similar situations with serious anomalous results. I think the State court of last resort, sitting en banc, with judicial responsibility for uniformity in criminal law

interpretation, should, as urged by the State, reconsider Davis on its merits in this appeal.*

II

Since, in this case, we unanimously have decided, quite correctly in my view, that the General Assembly intended to authorize simultaneous prosecution and cumulative punishment for assault in the first degree under 11 Del.C. § 613(1) and for possession of a deadly weapon during the commission of a felony under 11 Del.C. § 1447, we must face the difficult problem of double jeopardy.

In the initial opinion in this case, the majority made a noble effort to follow federal law in reaching its

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*In this area of the law, perhaps all anomaly cannot be eliminated. But anomalous results created by statutory construction, as in Davis, should give one pause and cause one to question whether the results were truly legislatively intended. Given the position of the majority, it is neither necessary nor desirable to engage in a reconsideration of Davis in this dissent. But, lest this view be thought frivolous, I note the following questions which might be included in a reconsideration. With regard to temporal sequence, did not the same Code that enacted the robbery statute simultaneously enact the weapons statute? Was not the legislative intent clearly expressed in the 1976 amendment adding the present § 1447(c) providing for consecutive sentencing? Is not the 3 year mandatory sentence for the first offense of robbery in the first degree, added by amendment in 1975, applicable even when a deadly weapon is not apparently displayed? Was not the statutory construction in Davis influenced by jeopardy concepts of double punishment? Does not Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978) relied on in Davis relate only to dual sentencing? Compare Busic v. United States, supra.

conclusion. See, for example, North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 665 (1969), Simpson v. United States, 435 U.S. 6, 11-12, 98 S.Ct. 909, 913, 55 L.Ed.2d 70, 76 (1978); Jeffers v. United States, 432 U.S. 137, 150, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168, 180 (1977). The conclusion that double jeopardy proscribed double punishment, which had been conceded by the State in the en banc oral argument, must, as recognized by the majority, be re-examined in the light of Whalen. It is clear from Whalen that four Justices of the United States Supreme Court [Justices White, Blackmun, Rehnquist and Chief Justice Burger] would hold that the double jeopardy limitation of the federal constitution imposed on the states by the Fourteenth Amendment does not prohibit two sentences in this case.

It is not clear from the five member majority decision in Whalen what those members would hold on the instant question. Justice Rehnquist's summary notwithstanding, I find it difficult to believe that Justices Brennen and Marshall held or would hold "that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy." That leaves three Justices [Justices Stewart, Stevens and Powell].

It seems to me that certain things can be said about the majority opinion in Whalen. First, it should be remembered

that the Court was deciding a case, not writing a treatise. Second, in achieving a majority, a worthwhile task, the opinion appears properly to be one of accommodation as perhaps best illustrated by the comment that "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." ____ U.S. at ____, 100 S.Ct. at 1436, ___ L.Ed.2d at ___ (emphasis added). Third, while the Court "is not [ready] to say that there are not constitutional limitations upon [Congress' "power to define criminal offenses and to prescribe the punishments to be imposed upon those guilty of them"]", its citations to support such limitations were narrowly selected with design and did not extend to the double jeopardy situation present in this case. See ftnt. 5, ____ U.S. at ____, 100 S.Ct. at 1436, ___ L.Ed.2d at ____. Fourth, the Court is searching for and open to different solutions relating to existing concepts. For example, there is a clear recognition of the legislative role under the constitutional principle of separation of powers and a clear suggestion of a problem of judicial usurpation. This recognition could well lead to a different approach in defining "same offense" than the elemental approach of recent years.

As I read Whalen, the Court has taken a turn, not ninety degrees, but decipherable. There has been a

recognition that recent opinions have been "[demanding] more of the Double Jeopardy Clause than it is capable of supplying." Western & Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 113. Furthermore, as I see it, there is implicit in the Whalen majority some support for the proposition that cumulative punishments may be imposed in a single trial if Congress defined the offenses separately and authorized cumulative punishments. See also Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 153 L.Ed.2d 187 (1977). Based on this reading, which I hope rises above blind speculation to at least educated surmise, I conclude the concept of double jeopardy as embodied in the Fourteenth Amendment of the United States Constitution does not proscribe the consecutive punishments which were imposed in this case.*

Finding no jeopardy violation, I am not compelled

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*This case has been argued on the basis of the Federal Constitution. Barring special circumstances, such as federal constitutional interpretation shocking to the conscience of civilized legal scholarship or diverse historic development, it is certainly preferable that interpretations of corresponding provisions in state and federal constitutions, which share a common history, be the same. On the instant record, I do not find any special circumstances present in this case. This is not to say, however, that there could not be State constitutional limits to some cumulative punishment cases. But it should be emphasized that this case has been submitted in the context of federal law.

to decide the appropriate procedure for resentencing.* As to other points raised by the appeal, I join in the conclusions of the majority and find no reversible error. Accordingly, I would affirm the judgment of the Superior Court.

*Compare Busic v. United States, supra, ftnt. 19, ____ U.S. at ____, ____ S.Ct. at ____, ___ L.Ed.2d at ____.

Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TOMMY WHACK,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

APPENDIX E

Opinion of Supreme Court of Missouri

Sours v. State, Supreme Court of Missouri, No. 61458, filed August 18, 1980

Supreme Court of Missouri

en banc

DUPLICATE OF FILING ON

AUG 18 1980

IN OFFICE OF CLERK SUPREME COURT

WILLIAM SCOTT SOURS,)
Appellant,)
vs.) No. 61458
STATE OF MISSOURI,)
Respondent.)

APPEAL FROM THE CIRCUIT COURT OF JASPER COUNTY

Honorable Ben F. Pyle, Judge

Appellant, William Scott Sours, pleaded guilty to two counts of an information filed June 20, 1977. Count I charged appellant with first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975; Count II charged armed criminal action, § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978). A separate punishment was imposed for each count. Appellant sought relief from his convictions in a collateral proceeding under Rule 27.26. In Sours v. State, 593 S.W.2d 208 (1980), we reversed the judgment of the trial court insofar as it denied appellant relief from his conviction for armed criminal action, and vacated and set aside that conviction on the ground that the conviction placed appellant twice in jeopardy for the same offense. We affirmed the judgment insofar as it denied appellant relief from his conviction for robbery first degree. The United States Supreme Court vacated our decision and remanded the case for reconsideration in the light of Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432 (1980). Missouri v. Sours, No. 79-1565, filed May 27, 1980. The detailed facts and prior procedural history of this case may be found in this Court's earlier opinion, 593 S.W.2d at 210.

The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal Constitution. The Court expressly declined to rule on this issue in Simpson v. United States, 435 U.S. 6 (1978). Cf. Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432 (1980). Each time a similar double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432, 1435 (1980); Simpson v. United States, 435 U.S. 6, 11 (1978); Iannelli v. United States, 420 U.S. 770, 785-86 nn. 17-18 (1975). See Jeffers v. United States, 432 U.S. 137, 155 (1977). No United States Supreme Court opinion has considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute.

In Whalen, the defendant was convicted of rape, D.C. Code Ann. § 22-2801, and of felony-murder, i.e., the killing of the rape victim in the course of the rape, D.C. Code Ann. § 22-2401. He was sentenced to consecutive terms of imprisonment of 20 years to life for first degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed, 379 A.2d 1152. The United States Supreme Court reversed, holding that under D.C. Code Ann. § 23-112,[1] Congress

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[1] D.C. Code Ann. § 23-112 provides:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

The Court stated that, although the phrasing of this statute was "less than felicitous," it would be construed to mean "that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense 'requires proof of a fact which the other does not.'" ____ U.S. at ____, 100 S.Ct. at 1438.

did not intend that multiple punishments be imposed for two offenses arising out of the same criminal transaction unless each offense requires proof of a fact which the other does not. The Court stated that

> Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape. See United States v. Greene, 160 U. S. App. D. C. 21, 489 F.2d 1145, 1158 (1973). Cf. Harris v. Oklahoma, 433 U.S. 682, 682-683 [1977].

___ U.S. at ___, 100 S.Ct. at 1439. The Court expressly reserved the question whether, had Congress clearly intended to impose multiple punishments for the same offense, the imposition of such punishment would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. The Court stated that, if the matter of whether it must defer to the construction given D.C. Code Ann. §§ 22-2801 and 22-2401 by the District of Columbia Court of Appeals were absent, "we would as a matter of course first decide the petitioner's statutory claim, and, only if that claim were rejected, would we reach the constitutional issue. See Simpson v. United States, 435 U.S. 6, 11-12." ___ 445 U.S. at ___, 100 S.Ct. at 1435. Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented.[2]

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[2] The Court stated:

> Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, we reverse the judgment of the Court of Appeals.

___ U.S. at ___, 100 S.Ct. at 1437.

Mr. Justice Rehnquist, in his dissent in Busic v. United States, ___ U.S. ___, 100 S.Ct. at 1747 (1980), considered the decision in

Mr. Justice Blackmun, concurring in the judgment in Whalen (Mr. Justice White filed an opinion concurring in part and concurring in the judgment and Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Chief Justice Burger joined) stated that prior cases had wrongly suggested:

> that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch clearly intended that multiple penalties be imposed for a single criminal transaction. See Simpson v. United States, 435 U.S. 6, 11-13 (1978); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion). I believe that the Court should take the opportunity presented by this case to repudiate those dicta squarely, and to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. I must concede that the dicta that seemingly support a contrary view have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double Jeopardy Clause's role in the area of multiple punishments.

____ U.S. at ____, 100 S.Ct. at 1441. Clearly, the five justices who joined in the opinion of the Court in Whalen (Justices Stewart, Powell, Stevens, Brennan, and Marshall) declined Justice Blackmun's invitation to hold that the question of what punishments are constitutionally permissible can be reduced to the question of what punishment the legislature intended to be imposed. The two questions remain distinct.[3]

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2 cont'd.

Whalen to have decided the very issue which it expressly reserved. He stated: "In Whalen v. United States, No. 78-5471 (filed April 16, 1980), six Members of this Court held that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy." ____ U.S. at ____, 100 S.Ct. at 1759. The Court in Whalen in fact held that the case involved a congressional intent not to impose cumulative punishments at a single criminal proceeding. ____ U.S. at ____, 100 S.Ct. at 1439. Perhaps it is noteworthy that eight members of the Court did not join in Mr. Justice Rehnquist's reading of the holding of Whalen.

3 Our refusal to collapse the constitutional question into the question of legislative intent does not commit us to the assumption, criticized by Mr. Justice Rehnquist, "that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses." See Whalen, ____ U.S. at ____, 100 S.Ct. at 1443 (Mr. Justice Rehnquist, dissenting). On the contrary, we recognize that the legislature may divide the criminal transaction into its subatomic particles, into protons and neutrons and electrons, into particles of different electrical charges and weights and spins.

The opinion of the Court in Whalen cited Simpson with approval for its separation of the statutory claim from the constitutional issue and for its avoidance of the constitutional issue by finding that the legislature did not intend multiple punishments. ____ U.S. at ____, 100 S. Ct. at 1435.

Our original opinion discussed in detail two recent United States Supreme Court cases in which the question whether the legislature intended to subject the defendant to multiple penalties for a single criminal transaction was carefully distinguished from the question whether cumulative punishments for the two offenses are constitutionally permissible. Simpson v. United States, 435 U.S. 6, 11 (1978); Jeffers v. United States, 432 U.S. 137, 155 (1977) (plurality opinion). See Sours v. State, 593 S.W.2d 208, 214-16 (1980).

The decision of the United States Supreme Court to vacate the original judgment of this Court and to remand this case "for further consideration in light of Whalen v. United States, 445 U.S. ___ (1980)," mandates that we reexamine the intent of the General Assembly in enacting § 559.225, RSMo Supp. 1976. In Whalen, the Court determined that Congress did not intend to punish the petitioner both for committing rape and for committing a killing in the course of the rape. In reaching this conclusion, the Court applied to D.C. Code Ann. § 23-112 the doctrine of Blockburger v. United States, 284 U.S. 299 (1932) as "a rule of statutory construction." ____ U.S. at ____, 100 S.Ct. at 1438. In Blockburger, the Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304.

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3 cont'd.

We hold only that, once the definition of a crime is fixed as a configuration of such elements, the state may not, consistently with the due process clause and the double jeopardy clause, impose separate punishments both for the neutron and for the atom of which it is a part.

The Blockburger rule has often been cited by the Court. At times it has been presented as a rule of statutory construction, but more often it has been used as the definition of "same offense" for double jeopardy purposes.[4] Whalen v. United States, ____ U.S. at ___, 100 S.Ct. at

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[4] In numerous decisions of the United States Supreme Court from 1902 to 1959, the same evidence test was uniformly treated as the definition of sameness of offense for double jeopardy purposes. The same evidence test was used more frequently in the single prosecution multiple punishment context than it was in the multiple prosecution context. Harris v. United States, 359 U.S. 19, 23-24 (1959) (single proceeding; convictions and punishments for purchasing heroin from an unstamped package, a violation of 26 U.S.C. § 4704(a), and for receiving and concealing the same knowing it to have been unlawfully imported, a violation of 21 U.S.C. § 174, affirmed; offenses held distinct under same evidence test); Gore v. United States, 357 U.S. 386, 388-91 (1958) (single proceeding; convictions and punishments for sale and distribution of heroin and cocaine not in the original stamped package, a violation of 26 U.S.C. § 4704(a), for sale of the drugs not pursuant to an order written on the requisite Treasury form, a violation of 26 U.S.C. § 4705(a), and for facilitating concealment and sale of the drugs, a violation of 21 U.S.C. § 174, affirmed; offenses held distinct under same evidenct test); Pereira v. United States, 347 U.S. 1, 9, 11-12 (1954) (single proceeding; convictions and punishments for mail fraud a violation of 18 U.S.C. § 1341, for transporting stolen property in interstate commerce, a violation of 18 U.S.C. § 2314, and for conspiracy to commit both offenses, a violation of 18 U.S.C. § 371, affirmed; offenses held distinct under same evidence test); United States v. Michener, 331 U.S. 789 (1947) (per curiam) (single proceeding; convictions and punishments for procuring a plate from which genuine $10 Federal Reserve Notes had been printed, and of having possession of such a plate, violations of 18 U.S.C. § 264; offenses held distinct under same evidence test; reversing 157 F.2d 616 (8th Cir. 1946)); American Tobacco Co. v. United States, 328 U.S. 781, 787-89 (1946) (single proceeding; convictions and punishments for conspiracy in restraint of trade, monopolization, and conspiracy to monopolize under Anti Trust Sherman Act; offenses held distinct under same evidence test); United States ex rel. Marcus v. Hess, 317 U.S. 537, 552 (1943) (single proceeding; convictions for 56 instances of defrauding the United States through collusive bidding on P.W.A. projects, violations of 18 U.S.C. §§ 80, 83, and separate forfeitures of $2,000 per instance plus double damages affirmed; the incidence of fraud on each project held distinct offense under same evidence test); Blockburger v. United States, 284 U.S. 299, 304 (1932) (single proceeding; convictions and punishments for sale of morphine not in or from the original stamped package and for sale not pursuant to a written order on the requisite Treasury form affirmed; offenses held distinct under same evidence test); King v. United States, 280 U.S. 521 (1929) (per curiam) (two proceedings; plea of former jeopardy rejected where sentence for selling morphine not in or from the original stamped package was imposed in one proceeding and executed before second indictment charging interstate shipment of drugs by a person who has not registered and paid the special tax required was brought; offenses held distinct under same evidence test; affirming 31 F.2d 17 (9th Cir. 1929)); Albrecht v. United States, 273 U.S. 1, 11-12 (1927) (single proceeding; convictions and punishments for four counts of illegal possession of liquor and four counts of illegal sale of liquor in violation of the National Prohibition Act and one count of maintaining a common nuisance affirmed; sale and possession held distinct under same evidence test);

1438 (1980); Simpson v. United States, 435 U.S. 6, 11, (1978); Brown v. Ohio, 432 U.S. 161, 166, (1977); Jeffers v. United States, 432 U.S. 137, 151 (1977) (plurality opinion) (see opinion of White, J., concurring in part and dissenting in part, at 158); Iannelli v. United States,

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4 cont'd.
Morgan v. Devine, 237 U.S. 632, 638-39, 641 (1915) (single proceeding; convictions and sentences on guilty pleas to charges of unlawful forcible breaking into a post office building with intent to commit larceny, a violation of § 192 of the Penal Code, and of stealing postage stamps and funds belonging to the United States, a violation of § 190 of the Penal Code, affirmed; offenses held distinct under the same evidence test; using same evidence test for two purposes--both to determine the legislative intent and separately to respond to the double jeopardy claim); Ebeling v. Morgan, 237 U.S. 625, 630-31 (1915) (single proceeding; convictions and punishments for six counts of tearing, cutting, and injuring United States mailbags, in violation of § 189 of the Federal Criminal Code, affirmed; offenses held distinct under the same evidence test); Gavieres v. United States, 229 U.S. 338, 343-44 (1911) (two proceedings; conviction and punishment for insulting a public officer by deed or word in his presence, a violation of article 257 of the Penal Code of the Philippine Islands, after previous conviction because of the same words and conduct of behaving in an indecent manner in a public place, a violation of an ordinance of the city of Manila; offenses held distinct under the same evidence test); Carter v. McClaughry, 183 U.S. 365, 394-95, 398 (1902) (single court martial proceeding; conviction and punishment for conspiring to defraud the United States, a violation of the 60th article of war, for causing false and fraudulent claims to be made against the United States, a violation of the 60th article of war, for conduct unbecoming an officer and a gentleman, a violation of the 61st article of war, and for committing embezzlement, a violation of § 5488 of the Revised Statutes of the United States and of the 62d article of war, held to be within the jurisdiction of the court martial; offenses held distinct under the same evidence test); In re Nielsen, 131 U.S. 176, 188, 190-91 (1889) (two indictments; conviction and punishment on a guilty plea to bigamy, i.e. living with more than one woman as husband and wife continuously from October 15, 1885, to May 13, 1888; second indictment charged adultery with one of the two women occurring on May 14, 1888; convicted for unlawful cohabitation held to bar a subsequent prosecution for adultery under the same evidence test, since the continuous bigamy offense necessarily implied sexual intercourse, so that proof of adultery did not require proof of a fact not also required to show bigamy).

The claim that the meaning of the phrase "same offense" in the multiple punishment context is in fact different from the meaning of the phrase "same offense" in the multiple prosecution context requires justification. We can find nothing in the legislative intent to impose two punishments, one for the greater offense and one for the lesser included offense, which would justify refusing to classify the two crimes as the "same offense" under the double jeopardy clause. If a state legislature could manipulate the meaning of the phrase "same offense" as it is used in the fifth amendment to the Constitution, there would be no reason to suppose that the Constitution prevents a legislature from authorizing, by a clear expression of intent, the sequential prosecution and punishment of the greater and lesser included offense.

420 U.S. 770, 785 n. 17, (1975).

In Whalen, the Court stated that the Blockburger rule had been consistently relied on ever since it was first stated in 1932:

> to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively. The assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

____ U.S. at ____, 100 S.Ct. at 1438. (Emphasis added.)

I. LEGISLATIVE INTENT

Applying Blockburger as a rule of statutory construction to the armed criminal action statute[5] and the statute defining the underlying

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[5] Section 559.225, RSMo Supp. 1976, defined the crime of armed criminal action and fixed the punishment for that crime as follows:

> 559.225. Armed Criminal Action--penalty--exceptions.--1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.
>
> 2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.
>
> 3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed, by, with, or through the use, assistance, or aid of a dan-

offense, in this case the robbery first degree statute,[6] we find that it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for committing robbery first degree "by, with, or through the use, assistance, or aid of a dangerous or deadly weapon," § 559.225, RSMo Supp. 1976, cannot be had without proving all the elements of the offense of robbery first degree. See Vitale v. United States, 48 U.S.L.W. 4741, 4744, No. 78-1845, filed June 19, 1980; Whalen, ____ U.S. at ___, 100 S.Ct. at 1439; Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977); United States

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> gerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.
>
> 4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

6 The underlying felony in this case was robbery first degree, as it was defined in § 560.120, RSMo 1969, and the punishment for which was prescribed in § 560.135, RSMo Supp. 1975. Section 560.120, RSMo 1969, provided:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent, by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo Supp. 1975, provided:

> Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

v. Greene, 160 U. S. App. D. C. 21, 489 F.2d 1145, 1158 (1973). Thus, the General Assembly should be presumed not to have intended that punishment be imposed under both statutes. ____ U.S. ____, 100 S.Ct. at 1438. Nevertheless, we find that the General Assembly has in clear and unequivocal terms expressed in § 559.225, RSMo Supp. 1976, its intent to authorize conviction and punishment for armed criminal action and for the underlying felony. In arriving at this conclusion, we apply every test and standard available to us under Missouri law. First, we consider the plain meaning of the language used. We consider the requirements of our own constitution regarding construction of the statute. We examine every reported decision involving convictions under the armed criminal action statute, in order to discern the application given the statute by Missouri's courts and prosecutors in prior cases. We examine the form of the information or indictment used to charge armed criminal action, both before and after a standard form for charging armed criminal action was approved; and we examine the form of the jury instructions used in submitting a charge of armed criminal action, both before and after a patterned instruction for submitting armed criminal action was approved.

The language of the armed criminal action statute shows that the General Assembly clearly intended that a defendant convicted of armed criminal action shall be punished for both armed criminal action and for the underlying felony. Section 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978) expressly provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action." (Emphasis added.) The armed criminal action statute provides in three separate subsections for punishment of not less than three years' imprisonment for the first offense, not less than five years' imprisonment for the second offense, and not less than ten years' imprisonment for the third. The legislative intent to impose punishment both for the underlying felony and for the

"compound" offense of which it is a part is clearly and unambiguously expressed in the following sentence, which appears in each of the three subsections: "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous [instrument] or deadly weapon." There is nothing ambiguous or uncertain about the meaning of this provision. The statute provides that the state may punish for any felony and also punish for that felony a second time in virtue of its having been committed through the use of a dangerous or deadly weapon. This is the plain meaning of the words used, and it is the unmistakable intent of our General Assembly. Clearly, § 559.225, RSMo Supp. 1976, provides for more than the mere enhancement of the sentence for the underlying felony. It calls for conviction of a second crime and for the imposition of a second sentence. Consequently, we cannot avoid the question whether the double jeopardy clause prohibits the imposition in a single proceeding of multiple punishments for the same offense.

What was said in City of St. Louis v. Crowe, 376 S.W.2d 185 (Mo. 1964) is fully applicable to our armed criminal action statute:

> This section of the statutes now under scrutiny is clear and unambiguous in its language. It is not susceptible of more than one construction. Therefore, we may not resort to any extraneous matter because there is no room for construction of such language. State ex rel. Bell v. Phillips Petroleum Co., 349 Mo. 360, 160 S.W.2d 764; Rathjen v. Reorganized School Dist. R-II of Shelby County, 365 Mo. 518, 284 S.W.2d 516. We have no right to read into the statute an intent which is contrary to the legislative intent made evident by the phraseology employed. State ex inf. Rice ex rel. Allman v. Hawk, 360 Mo. 490, 228 S.W.2d 785; Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577. The legislative pronouncement means what it says....

376 S.W.2d at 189-90. See State ex rel. Stevenson v. Kirkpatrick, 536 S.W.2d 740, 741 (Mo. banc 1976); State ex rel. Dravo Corp. v. Spradling, 515 S.W.2d 512, 517 (Mo. 1974); Missourians for Honest Elections v. Missouri Elections Commission, 536 S.W.2d 766, 775 (Mo.App. 1976); Consolidated School District No. 1 of Jackson County v. Bond, 500 S.W.2d 18, 21 (Mo.App. 1973). See also J. Sutherland, 2A Statutes and

Statutory Construction § 46.01, pp. 48-49 (C. Sands 4th ed. 1973).

We note that we are not free to construe the armed criminal action statute as a mere punishment-enhancement statute which amends by implication numerous felony statutes, because Mo. Const. art III, § 28 prohibits the General Assembly from amending statutes without setting forth in full the statutes so amended. Sours v. State, 593, S.W.2d 208, ____ 222 n. 10 (Mo.banc 1980); State v. Valentine, 584 S.W.2d 92, 96 (Mo. banc 1979). Cf. State v. Hudson, 562 S.W.2d 416 (Tenn. 1978).

The uniformity of the interpretation and application of § 559.225, RSMo Supp. 1976 (§ 571.015, RSMo 1978), confirms that it plainly authorizes punishment both for armed criminal action and for the underlying felony. Following the original Sours opinion our prosecutors and penal authorities indicated informally to this Court that they believed that as many as four hundred to six hundred prior convictions might be affected by the opinion. In the four years since the enactment of the statute, the appellate courts of this state have been called upon literally dozens of times to review convictions for both armed criminal action and the underlying felony.[7] In none of these cases

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[7] State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979) (per Rendlen, J.) (affirming unspecified sentences for both armed criminal action and robbery first degree); State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), cert. denied, 439 U.S. 838 (1978) (per Donnelly, J.) (three year sentence for armed criminal action and fifteen years for robbery first degree, to run consecutively); State v. Merritt, 591 S.W.2d 107 (Mo.App. 1979) (per Manford, J.) (five years for armed criminal action to run concurrently with consecutive sentences of twenty years for robbery first degree and five years for assault with intent to kill with malice); State v. Irvin, 590 S.W.2d 699 (Mo.App. 1979) (per Clemens, Sr.J.) (five years for armed criminal action to run consecutively to twenty years for robbery); Riley v. State, 588 S.W.2d 738 (Mo.App. 1979) (per Kelly, J.) (three years for armed criminal action to run consecutively to concurrent sentences of seventeen years each for two counts of robbery first degree and one count of assault with intent to kill. State v. Pollard, 588 S.W.2d 212 (Mo.App. 1979) (per Swofford, J.) (five years for armed criminal action to run concurrently with five years for sodomy and to run consecutively to twenty-five years with rape. State v. Medley, 588 S.W.2d 55 (Mo.App. 1979) (per Pudlowski, J.) (three years for armed criminal action and twenty years for robbery first degree); State v. Mays, 588 S.W.2d 6 (Mo.App. 1979) (per Reinhard, P.J.) (five years for armed criminal action to run consecutively to fifteen years for robbery first degree); State v. Tyler, 587 S.W.2d 918 (Mo.App. 1979) (per Kennedy, J.) (twenty-five years for armed criminal action to run consecutively to seventy-five years for robbery first degree, seventy-five years for rape, and ten years for kidnapping);

was it ever questioned that the legislature intended to say exactly what it said in the armed criminal action statute. No case has been discovered where the armed criminal action statute has not been understood by our trial and appellate judges and by our prosecutors, assistant attorneys general, and Attorney General to mean that punishment may be imposed once for a felony and a second time ("in addition to") for the same felony if it was committed by the use, aid, or assistance of a

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State v. Williams, 587 S.W.2d 618 (Mo.App. 1979) (per Crist, J.) (five years for armed criminal action to run concurrently with twenty years for robbery first degree); State v. Gant, 586 S.W.2d 755 (Mo.App. 1979) (per Somerville, P.J.) (reversing conviction for armed criminal action where armed criminal action in conjunction with assault was charged but armed criminal action in conjunction with murder was submitted in jury instructions); State v. Crews, 585 S.W.2d 131 (Mo.App. 1979) (per Gunn, J.) (sentences unspecified; underlying felony unspecified; convictions for armed criminal action, first degree robbery, and three counts of assault with intent to kill with malice); State v. Brown, 584 S.W.2d 413 (Mo.App. 1979) (per Reinhard, P.J.) (thirty years for one count of armed criminal action to run concurrently with ten years each for two counts of robbery first degree); State v. Jones, 583 S.W.2d 561 (Mo.App. 1979) (per Clemens, J.) (three years for armed criminal action to run consecutively to robbery first degree) (reversed and remanded for error in admission of heresay); State v. Burse, 583 S.W.2d 221 (Mo.App. 1979) (per Crist, J.) (thirty-five years for armed criminal action to run concurrently with eight years for attempted robbery first degree); State v. Davidson, 583 S.W.2d 208 (Mo.App. 1979) (per Higgins, Sp.J.) (unspecified sentences for one count of armed criminal action and two counts of robbery first degree); State v. Hutchinson, 582 S.W.2d 350 (Mo.App. 1979) (per Crist, J.) (twenty-five years for one count of armed criminal action to run concurrently with concurrent sentences of twenty-five years each for eight counts of robbery first degree); State v. Hawkins, 582 S.W.2d 333 (Mo.App. 1979) (per Pritchard, J.) (underlying felony unspecified; three years for armed criminal action to run consecutively to ten years for robbery first degree and fifteen years for assault with intent to do great bodily harm with malice) (reversed for defect in jury panel); State v. Burns, 581 S.W.2d 590 (Mo.App. 1979) (per Reinhard, P.J.) three years for armed criminal action to run consecutively to fifteen years for robbery first degree); State v. Bargeon, 578 S.W.2d 364 (Mo.App. 1979) (per Gunn, J.) (twenty-five years for armed criminal action to run consecutively to seventy-five years for rape); State v. Jones, 578 S.W.2d 286 (Mo.App. 1979) (per Reinhard, P.J. (underlying felony unspecified; five years for armed criminal action to run consecutively to consecutive sentences of ten years for forcible rape and five years for robbery first degree); State v. Carter, 577 S.W.2d 109 (Mo.App. 1978) (per Welborn, Sp.J.) (five years for armed criminal action to run concurrently with ten years for robbery first degree); State v. Woods, 578 S.W.2d 942 (Mo.App. 1978) (per Clemens, J.) (three years for armed criminal action to run consecutively to twenty years for robbery first degree); State v. Tilley, 569 S.W.2d 346 (Mo.App. 1978) (per Reinhard, J.) (fifteen years for armed criminal action to run consecutively to ten years for attempted robbery in the first degree); Simms v. State, 568 S.W.2d 801 (Mo.App. 1978) (per McMillian, J.) (three years for armed criminal action to run consecutively to twelve years for robbery first degree).

dangerous or deadly weapon. No amount of analysis premised on presumptions concerning legislative intent can obscure the fact that § 559.225, RSMo Supp. 1976, provides that a person guilty of armed criminal action shall be punished for both of two crimes, one of which by definition includes every element of the other.

This construction of our state statute is binding on the United States Supreme Court. In Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973), the United States Supreme Court stated: "[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a state." Id. at 256; O'Brien v. Skinner, 414 U.S. 524, 531 (1973).

In the reported decisions involving convictions for both armed criminal action and the underlying felony, the armed criminal action charge was entered in a separate count from that charging the underlying felony. The two-count information in the instant case is typical. Count I alleged:

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously by means of a certain dangerous and deadly weapon, to-wit: a handgun, take, stea[l] and carry away Nine Hundred Forty-nine and 06/100 ($949.06) Dollars, lawful money of the United States of America, the money and personal property of Mr. Quick, then and there in the lawful care and custody of Kendall Carnes, by then and there putting the said Kendall Carnes in fear of an immediate injury to his person and then and there did feloniously rob, take, steal and carry away the said money and personal property from the person of, in the presence of and against the will of the said Kendall Carnes with the felonious intent to permanently deprive the owner of the use thereof and to convert the same to his own use.

Count II alleged:

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously commit a felony, to-wit: Robbery First Degree, by and with the use, aid and assistance of a dangerous or deadly weapon, to-wit: a handgun.

See Jeffers v. United States, 432 U.S. 137, 150 n. 16 (1977).

This Court recently approved a patterned charge for use in charging armed criminal action, MACH-Cr 25.02, the patterned charge is as follows:

The (Grand Jurors) (Circuit Attorney) (Prosecuting Attorney) of the (City)(County) of _____, State of Missouri, charge(s) that the defendant, in violation of Section 571.015, RSMo, committed the class A felony of armed criminal action, punishable upon conviction under Section (571.015.1) (571.015.2) (571.015.3), RSMo, in that (on) (on or about) [date], in the (City) (County) of _____, State of Missouri, the defendant [insert one of the following, omitting number and brackets]

[1] committed the felony of [name of felony] charged in Count ___, all allegations of which are incorporated herein by reference, and

[2] committed the felony of [name of felony, alleging all essential elements thereof with the same specificity as that used in a charge of that felony], and

The defendant committed the foregoing felony of [name of felony] by, with and through the use, assistance and aid of a (dangerous instrument) (deadly weapon) (, and)

((On) (On or about) [date] in [identify the particular court and jurisdiction], the defendant was convicted of the offense of armed criminal action (, and))

((On) (On or about) [date] in [identify the particular court and jurisdiction], the defendant was convicted of the offense of armed criminal action)).

Both pre-patterned and patterned charges indicate that our statute has been universally interpreted to permit the charging of armed criminal action and the underlying felony in separate counts.

Similarly, the instructions commonly used to submit to the jury the question of the guilt or innocence of the accused of armed criminal action and of the underlying felony illustrate that the statute has uniformly been interpreted to authorize separate conviction and punishment for both armed criminal action and the underlying felony, as does our recently adopted pattern jury instruction, MAI-Cr 25.02. The verdict-directing instructions used in State v. Treadway, 558 S.W.2d 92 (Mo. banc 1979) are typical:

INSTRUCTION NO. 7

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on September 25, 1976, in the City of St. Louis, State of Missouri, Rotha Grimes was in charge of a purse owned by Jerry Hanks, and

Second, that at that time and place the defendant, acting with another, took the property from Rotha Grimes against her will by causing her to fear immediate injury to her person, and

Third, that the defendant, acting with another, took the property with the intent to permanently deprive Rotha Grimes and Jerri Hanks of the property and to convert it or any part of it to the use of the defendant and another, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with

another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count 1 of robbery in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense.

MAI-CR 7.60 modified by 2.12
Submitted by the State
Given by the Court

INSTRUCTION NO. 8

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant, acting with another, committed the crime of robbery in the first degree, a felony, as defined heretofore in Instruction No. 7, and

Second, that the perpetration of the aforesaid felony was done through the aid or use of a weapon, to-wit: a gun, held by either the defendant or his accomplice, and

Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count II of armed criminal action.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty under Count II of that offense.

Not in MAI-CR
Modified by 2.12
Submitted by the State
Given by the Court

INSTRUCTION NO. 9

The defendant is charged with a separate offense in each Count submitted to you. Each offense and the evidence and law applicable to it should be considered separately. Any evidence which was or has been limited to one of the offenses charged or one purpose should not be considered by you as to another offense charged or for any other purpose.

You may find the defendant guilty or not guilty on any or all of the Counts submitted against him.

MAI-CR-2.70
Given by the Court

Our pattern jury instructions for use in submitting armed criminal action, MAI-Cr2d 25.02, were promulgated effective January 1, 1979. The verdict-directing instruction which was provided for use in cases involving a first offender under the armed criminal action statute, and "where the underlying felony is charged in a separate count," is as follows:

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant is guilty under Count ____ of ([name of the offense, if it is a felony under all circumstances]) ([name of the offense, and if it is a misdemeanor under some circumstances and a felony under other circumstances, include the circumstances making it a felony]), and

Second, that the defendant committed that offense by, with or through the use, assistance or aid of a (dangerous instrument) (deadly weapon),

then you will find the defendant guilty (under Count ____) of armed criminal action.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty (under Count _____) of armed criminal action, you will assess and declare his punishment at imprisonment by the division of corrections for a term fixed by you, but not less than three years or more than life imprisonment.

We have measured the legislature's intent regarding § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978) by every test and standard available to us under the law of Missouri. The conclusion is inescapable that the Missouri General Assembly did intend to impose punishment for armed criminal action "in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous [instrument] or deadly weapon." The General Assembly did clearly intend to impose two separate punishments for armed criminal action and the lesser included offense.

At this point, the mandate that we reconsider in light of Whalen offers little help or guidance. In Whalen it was determined that Congress had not intended cumulative punishments. The constitutional question could be and was reserved by the Court. In other cases in which the legislative intent was less clear than it is in the case of our armed criminal action statute, the constitutional question also has been reserved. Simpson v. United States, 435 U.S. 6, 11 (1978); Iannelli v. United States, 420 U.S. 770, 785-86 nn. 17-18 (1975). See Jeffers v. United States, 432 U.S. 137, 155 (1977). The unique wording of the Missouri statute and the clear, positive and unequivocal intent to doubly punish, does not leave us a similar option. The unique wording

of the armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue.[8]

II. DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT FOR THE SAME OFFENSE

There is little we can add to the analysis given the constitutional question in Sours v. State, 593 S.W.2d 208, 211-14, 218-21 (Mo. banc 1980), and we would incorporate that analysis by reference into our opinion today, and reinstate the opinion originally published. The argument can be reduced to a simple syllogism:

(i) The double jeopardy clause of the fifth amendment to the United States Constitution prohibits the state from punishing a person twice for the same offense. Benton v. Maryland, 395 U.S. 784, 793-96 (1969); North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Neal, 514 S.W.2d 544, 548 (Mo. banc (1974); State v. Parsons, 513 S.W.2d 430, 437-38 (Mo. (1974).

(ii) Armed criminal action and the underlying felony used to prove armed criminal action--in this case, robbery first degree--are the same offense for double jeopardy purposes under the same evidence test, because it is not the case that proof of robbery requires proof of any fact not also required to prove armed criminal action. Vitale v. United States, No. 78-1845, filed June 19, 1980; Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432, 1439 (1980); Simpson v. United States, 435 U.S. 6, 11 (1978); Brown v. Ohio, 432 U.S. 161, 166 (1977); Jeffers v. United States, 432 U.S. 137, 151 (1977); Iannelli v. United States, 430 U.S. 770, 785 n. 17 (1975); Harris v. United States, 359 U.S. 19, 23-24 (1959); Gore v. United States, 357 U.S. 386, 388-91 (1958); Blockburger v. United States, 284 U.S. 299, 304 (1932); Carter v. McClaughry, 183 U.S. 365, 394-95, 398 (1902); Morey v. Commonwealth, 108 Mass. 433, 434 (1871).

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8 Firm as our conviction may be that neither a citizen of Missouri nor a citizen of the United States should be twice punished for the same offense, to so hold under the Missouri Constitution would require reinterpretation of our own double jeopardy clause, Mo. Const. art I, § 19, which has been construed to apply "only where there has been an acquittal of the defendant by a jury." Murray v. State, 475 S.W.2d 67, 70 (Mo. 1972); Kansas City v. Henderson, 468 S.W.2d 48, 52 (Mo. 1971), cert. denied, 404 U.S. 1004 (1971). See Sours v. State, 593 S.W.2d 208, 210 (Mo. banc 1980).

(iii) Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and for the underlying felony.

We continue to find this argument persuasive.

We may note that Whalen's application of the Blockburger doctrine as a rule of statutory construction paralleled the application given Blockburger in our effort to resolve the constitutional issue in Sours. Compare Whalen, ____ U.S. at ____, 100 St.Ct. at 1439, with Sours, 593 S.W.2d at 219. In Sours, we stated that if the underlying felony used to prove armed criminal action were a single named felony instead of a class of offenses, "it would be obvious that armed criminal action includes all of the elements of the felony specified." We observed that "the result is no different where the statute refers to 'any felony.'" 593 S.W.2d at 219. In Whalen, the Court concluded that "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." ____ U.S. at ____, 100 S.Ct. at 1439. The Court rejected the government's contention that felony murder and rape were not the same offense under the same evidence test of Blockburger.

> The Government contends that felony murder and rape are not the "same offense" under Blockburger, since the former offense does not in all cases require proof of a rape; that is, D.C. Code § 22-2401 proscribes the killing of another person in the course of committing rape or robbery or kidnapping or arson, etc. Where the offense to be proved does not include proof of a rape--for example, where the offense is a killing in the perpetration of a robbery--the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under Blockburger. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense.
>
> There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.

____ U.S. at ____, 100 S.Ct. at 1439.

The application of the same evidence test in Sours is also supported by the United States Supreme Court's holding in Vitale v. United States, No. 78-1845, (filed June 19, 1980), (48 U.S.L.W. 4741) a multiple prosecution case. In Vitale, respondent, a juvenile was convicted of failing to reduce speed to avoid an accident, a violation of § 11-601(a) of the Illinois Vehicle Code. The charge arose out of an accident in which an automobile driven by respondent struck and fatally wounded two small children. Subsequently, a petition for adjudication of wardship was filed against respondent in the Circuit Court of Cook County, charging Vitale with two counts of involuntary manslaughter. The Illinois Supreme Court upheld the dismissal of the second proceeding on the ground that it was barred by the double jeopardy clause. In re Vitale, 71 Ill.2d 229, 375 N.E.2d 87 (1978). The United States Supreme Court vacated the judgment and remanded the case for consideration whether the judgment was based on state or federal grounds. 439 U.S. 974 (1978). The Illinois Supreme Court certified that the judgment was based on federal constitutional grounds, and the United States Supreme Court again granted certiorari. ____ U.S. ____, 100 S.Ct. 42 (1979). The Court reaffirmed the principle that the double jeopardy clause not only prohibits multiple prosecutions for the same offense but also protects against imposing multiple punishments for the same offense. ____ 445 U.S. at ____, 48 U.S.L.W. at 4743. Accord, Brown v. Ohio, 432 U.S. 161, 165 (1977); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The Court in Vitale also reaffirmed its holding in Harris v. Oklahoma, 433 U.S. 682 (1977):

> In Harris, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a

> separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under In re Neilsen, 131 U.S. 176 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense--an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under Brown, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

____ U.S. at ____, 48 U.S.L.W. at 4744.

Despite the Illinois Supreme Court's assertion in Vitale that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter," and its conclusion that "the greater offense is by definition the 'same' as the lesser offense included within it," 71 Ill.2d at 239, 375 N.E.2d at 91, the United States Supreme Court vacated the judgment and remanded the case for further proceedings "[b]ecause of our doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown." ____ U.S. at ____, 48 U.S.L.W. at 4744.

We are here forced to address the constitutional issue expressly reserved in Whalen, ____ U.S. at ____, 100 S.Ct. at 1435, 1437; Simpson, 435 U.S. at 11; and Iannelli, 420 U.S. at 785-86 nn. 17-18. See Jeffers, 432 U.S. at 155. We must conclude, for the reasons set forth in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), that the proof of the underlying felony--robbery first degree--does not require proof of a fact not also required to prove armed criminal action, or in other words, that proof of armed criminal action necessarily proves every fact required to establish the underlying felony. Consequently, the two offenses are the "same offense" for double jeopardy purposes, Vitale, ____ U.S.at ____, 48 U.S.L.W. at 4744; Whalen, ____ U.S. at

____, 100 S.Ct. at 439; Harris, 433 U.S. at 682; Brown, 432 U.S. at 167, and the double jeopardy clause prohibits the state from punishing appellant for both offenses. We believe that, because the double jeopardy clause prohibits punishing a person twice for the same offense, "the prosecution may not do in one trial what it is prohibited from doing in two trials." Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978). See cases that apply the rationale of Harris v. Oklahoma in the single prosecution context. State v. Morgan, 592 S.W.2d 796, 803 (Mo. banc 1980); State v. Pinder, 375 So.2d 836, 838 (Fla. 1979); Tyson v. State, 386 N.E.2d 1185, 1193 (Ind. 1979); Mitchell v. State, 382 N.E.2d 932, 934 (Ind. 1978); Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978); State v. Frye, 283 Md. 709, 393 A.2d 1372, 1375 (1978); Briggs v. State, 573 S.W.2d 157, 159 (Tenn. 1978). See also State v. Neal, 514 S.W.2d 544, 548 (Mo. banc 1974); State v. Parsons, 513 S.W.2d 430, 438 (Mo. 1974).

If the vacation of our prior judgment and the remand of the case for reconsideration in light of Whalen was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read Whalen and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of "same offense" under the double jeopardy clause. It would grant to the state legislature the power to define the meaning of "same offense" as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court

to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

After thorough examination of the opinions in Whalen v. United States, ____ U.S. ____, 100 S.Ct. 1432 (1980), we have concluded that our original opinion and judgment in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), was correct and should be reinstated as supplemented by our opinion today. We reverse the judgment of the trial court insofar as it denied appellant relief from his conviction for armed criminal action, and vacate and set aside that conviction. We affirm the judgment of the trial court insofar as it denied appellant relief from his conviction for robbery first degree.

WARREN D. WELLIVER, Judge

Bardgett, C.J., Seiler, Morgan and Higgins, JJ., concur; Donnelly, J. dissents in separate dissenting opinion filed; Rendlen, J. dissents in separate dissenting opinion filed and concurs in dissenting opinion of Donnelly, J.

Supreme Court of Missouri

en banc

WILLIAM SCOTT SOURS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 61458
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

DISSENTING OPINION

In Benton v. Maryland, 395 U.S. 784 (1969), the United States Supreme Court overruled Palko v. Connecticut, 302 U.S. 319 (1937) and applied the Double Jeopardy Clause of the United States Constitution to the states.

In Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), a majority of this Court ordered a conviction under Missouri's armed criminal action statute set aside because it felt compelled to do so by general declarations of law made in Harris v. Oklahoma, 433 U.S. 682 (1977).

On May 27, 1980, in Missouri v. Sours, No. 79-1565, the United States Supreme Court vacated the judgment of this Court in Sours, and remanded the case to this Court "for further consideration in light of Whalen v. United States, 445 U.S. _____ (1980)."

Of course, the mandate of May 27, 1980, is the law of the case and is binding on this Court.

In North Carolina v. Pearce, 395 U.S. 711, 717 (1969), the United States Supreme Court stated "that the Fifth Amendment guarantee against double jeopardy * * * has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a

second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. * * * ."

I agree with the conclusion of the principal opinion that the Missouri General Assembly intended that two separate punishments be imposed for first degree robbery and armed criminal action. I do not agree that the holdings in Harris and Vitale, both second prosecution cases, are pertinent to this multiple punishments case. See State v. Neal, 514 S.W.2d 544, 550, 551 (Mo. banc 1974) (Donnelly, C.J., concurring). See also Rules 23.05 and 24.07.

The essential question is: should this Court apply the holdings of Harris and Vitale, both second prosecution cases, in this multiple punishments case when we know that the United States Supreme Court declined the opportunity to apply the Harris holding in Simpson v. United States, 435 U.S. 6, 12 (1978), also a multiple punishments case? I think not. In Oregon v. Hass, 420 U.S. 714, 719 (1975), the Court stated that "a State may not impose * * * greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." See also North Carolina v. Butler, 441 U.S. 369, 376 (1979).

In my view, the logic of Whalen is that the multiple punishments proscription of Pearce is satisfied if the multiple punishments in this case were intended and authorized by the General Assembly--to hold otherwise is to make the mandate of May 27, 1980, inscrutable.

I respectfully dissent.

Robert T. Donnelly, Judge

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
AUG 18 1980
IN OFFICE OF
CLERK SUPREME COURT

WILLIAM SCOTT SOURS,
Appellant,
vs.
STATE OF MISSOURI,
Respondent.

No. 61458

DISSENTING OPINION

INTRODUCTION

I respectfully dissent. The majority's mechanical treatment of Blockburger v. United States, 284 U.S. 299 (1932), "same offense" test as substantive double jeopardy doctrine is in my view a misapplication of that test and an exaltation of form over substance. The principal opinion decides the double jeopardy clause forbids conviction and punishment in a single prosecution for armed criminal action and robbery under Blockburger. The majority does so against a tapestry of dicta woven largely from successive prosecution cases and by skillful conversion of the canon for "statutory construction" prescribed by Blockburger, into a rigid doctrine of constitutional right. The Supreme Court's mandate that on reconsideration we be guided by Whalen v. United States, ___U.S.___, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980), neither so requires nor permits. In this regard the present effort is little more than a recasting of our original opinion vacated by the Court.

William Scott Sours was charged with robbery first degree by means of a dangerous and deadly weapon (§ 560.120, RSMo 1969 and § 560.135, RSMo Supp. 1975) and armed criminal action (§ 559.225, RSMo

Supp. 1976) for participating in an armed robbery of a Mr. Quick Store in Jasper County. On October 5, 1977, Sours pled guilty to both charges and on January 5, 1978, was sentenced to five years imprisonment on the robbery conviction and three years imprisonment on the armed criminal action conviction, the sentences to run consecutively. See Sours v. State, 593 S.W.2d 208, 209-210 (Mo. banc 1980) (vacated ___U.S. ___, 64 L.Ed.2d 820 (1980)).

It should be noted at the outset that the majority fails to address the important question of whether Sours' guilty plea constituted "a break in the chain of events" so as to preclude litigation of the double jeopardy issue in this post-conviction Rule 27.26 proceeding. See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Francis v. Henderson, 425 U.S. 536, 541-542 (1976); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977). c.f. Jeffers v. United States, 432 U.S. 137, 152 (1977). Recently in Weir v. State, 589 S.W.2d 256 (Mo. banc 1979), this Court questioned the cognizability of a claim of double jeopardy in a Rule 27.26 proceeding following defendant's failure to raise the objection at the trial level. The majority fails to consider the rule announced by Weir, at 258:

> [I]t is now settled by numerous decisions in both the federal and state systems that where there is a deliberate bypass, whether for strategic, tactical, or other reasons, of orderly state procedure, a movant is precluded from raising a constitutional issue on a post conviction motion.

Instead of eagerly seizing the constitutional issue, we should remand for a determination by the sentencing court whether Sours by pleading guilty has deliberately by-passed orderly state procedures[1] and only after a determination that he has not, should we address the far reaching federal constitutional question.

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[1] The "deliberate bypass" standard employed by our courts in determining whether constitutional issues improperly preserved at trial may be raised in post-conviction proceedings is similar to the "cause and prejudice" standard employed in the federal system for making determination in habeas proceedings. Wainwright v. Sykes, 433 U.S. 72, 95n.1 (1977) (Stevens, J., concurring).

Turning to the constitutional issue, it was the framers' intent[2] that the Fifth Amendment embody the common law's double jeopardy protection against a defendant's reprosecution following conviction or acquittal upon a criminal charge.[3] See Brown v. Ohio, 432 U.S. 161, 165 (1977); United States v. Wilson, 420 U.S. 332, 340-342 (1975). James Madison tendered the original draft of the Fifth Amendment,[4] later amended to its present form, midst concern that a defendant's right to new trial not be abridged by a conviction erroneously obtained. See Wilson, id. citing I Annals of Congress 753 (1789). At the time of adoption the limited number of common law felonies, e.g., rape, robbery, murder, arson and burglary allowed for ready application and more certain protection for criminal defendants under the double jeopardy clause. Today, given the proliferation of complex statutory crimes, it is recognized that the doctrine's original scope cannot provide complete and certain answers in many cases. Nevertheless in the constitutional construction process, we are guided by the purposes and policies underlying the constitutional protections afforded by the framers and those who ratified our Bill of Rights.

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2 For a discussion of the historical development of the concept of double jeopardy see Bartkus v. Illinois, 359 U.S. 121, 151-155 (1959) (dissenting opinion of Justice Black).

3 At common law double jeopardy was in the nature of a plea of abatement. The technical plea was either autrefoits acquit or autrefoits convict. See 2 Hawkins, Pleas of the Crown, 522-537 (6th. ed. 1777). Either plea was an absolute bar to a subsequent prosecution as "the party ought not to be brought twice into danger of his life for the same crime." Id. at 534.

4 The original proposal would have protected a defendant from "more than one punishment or one trial for the same offense . . . " United States v. Wilson, 420 U.S. 332, 341 (1975), citing I Annals of Congress 434 (1789).

The fountainhead of that aspect of double jeopardy jurisprudence described as the double punishment doctrine appears to be Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873). There the sentencing court exceeded the legislative authorization for punishment of a statutory crime. Defendant was convicted of stealing post office property for which the statutes provided as punishment, imprisonment for not more than one year or a fine of $10 to $200. The court however sentenced Lange to one year's imprisonment and a fine of $200. It was in that context of the trial court having exceeded its statutory authority that the double punishment doctrine had its origins. On review, the Court was concerned with the trial court having exceeded the legislative authorization not the legislature's constitutional authority to proscribe certain acts as crimes and prescribe punishment therefore. The Court at 176 stated:

> We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. (Emphasis added.)

Whalen v. United States, ___U.S.___, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980), which guides us here, emphasized that the decision in terms of "double punishment" turns on the legislative intent, stating that "the dispositive question, therefore, is whether Congress did so provide." 100 S. Ct. 1432 at 1436, 63 L.Ed.2d at 722

The double punishment doctrine does not constitute a substantive limitation on the legislature's power to define and punish crimes. See Whalen v. United States, ___U.S.___, 100 S. Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (1980) (concurring opinion of White, J.); ___U.S.___, 100 S. Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (concurring opinion of Blackmun, J.) Westen and Drubel, Towards A General Theory of Double Jeopardy, Sup. Ct. Rev. 81, 112-115 (1978). See also Note "Twice in Jeopardy" 75 Yale L. J. 262, 311-313 (1965). The Court in Whalen addressed

the multiple punishment issue in terms of whether the judicial action had exceeded the legislative authorization. After a discussion of Lange, which as noted above can best be described as a legislative authorization case, the Court held, "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principal that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." Whalen, ___U.S.___, 100 S. Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980).

The reason for this conclusion seems self apparent. To say that the legislature can punish crime X by life imprisonment but that it cannot define certain acts as crime X^1 punishable by five years to life and crime X^2 punishable by three years to life respectively, employs an intellectual artifice providing the criminal defendant little or no additional protection. The majority holds that under the then applicable statutes a defendant could be convicted of armed robbery punishable by five years to life or of armed criminal action and sentenced to three years to life,[5] but could not be convicted of both

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[5] Section 560.135, RSMo 1969, provided that a person convicted of robbery in the first degree by means of a dangerous and deadly weapon could be sentenced to death or imprisonment ranging from a minimum of 5 years to life. Those convicted of robbery in the first degree could be sentenced only to imprisonment ranging from a minimum of 5 years to life. Id. Subsequently in 1975 the legislature amended the statute and provided that the punishment for both robbery in the first degree and robbery in the first degree by means of a dangerous and deadly weapon would be imprisonment ranging from a minimum of 5 years to a life term. § 560.135, RSMo Supp. 1975.

Section 559.225, RSMo Supp. 1976 provides:

> 1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly

in the same proceeding and if so convicted the armed criminal action conviction must be vacated. (One might ask, why the armed criminal action conviction?) The principal opinion skirts the Double Jeopardy Clause's historical purpose to protect the defendant from harassment, relitigation, and judicial usurpation of the legislative authority to punish. See Note, Twice in Jeopardy, 75 Yale L.J. 262, 266-267 (1965). Instead the majority seeks to transform the provision protecting against double punishment

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5 cont'd.

weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

into a diluted analogue of the Eighth Amendment without measurably enhancing the defendant's protections as shown above.[6] Though the Eighth Amendment remains a vital and essential safeguard against excessive punishment by the legislature (see Coker v. Georgia, 433 U.S. 584, 592 (1977); State v. Higgins, 592 S.W.2d 151 (Mo. banc 1979), appeal dismissed ___U.S.___, 100 S. Ct. 1825 (1980), redesigning the Fifth Amendment to serve the purpose filled by the Eighth serves no legitimate function[7] and violates the canons of orderly constitutional construction.

The only apparent justification for the majority's manipulation of the double punishment doctrine is to guard against prosecutorial and judicial arbitrariness. A constitutional issue of some dimension would be presented if the statutory pattern allowed random and capricious results in which some defendants were convicted of one of the constituent crimes and others convicted of both without any ascertainable justification. Such is not the case under our statutes. The legislature,

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[6] It is true that conviction of both robbery in the first degree and armed criminal action will affect a prisoner's eligibility for parole. See Rules and Regulations Governing the Granting of Paroles, Conditional Releases, and Related Procedures, Missouri Board of Probation and Parole, pp. 8-10 (1979). However such delay in parole eligibility would be present upon a conviction for armed criminal action alone. Id., § 559.225, RSMo Supp. 1976. The mere fact that multiple convictions occur and consecutive sentences are imposed does not alter eligibility for parole in any way. Rules and Regulations Governing the Granting of Paroles, Conditional Releases, and Related Procedures, Missouri Board of Probation and Parole, pp. 11-12 (1979).

[7] This Court has held that punishment enhancement schemes which impose additional liability upon conviction of a crime if certain facts are shown to exist (i.e., previous convictions) are not violative of double jeopardy. See § 556.280, RSMo 1969 (repealed); §558.016, RSMo 1978; State v. Johnstone, 335 S.W.2d 199, 204 (Mo. 1960), cert. denied, 364 U.S. 842 (1960). It is difficult to perceive a functional difference between a sentence enhancement scheme and the "armed criminal action - first degree robbery consecutive punishment plan" the majority now holds is forbidden by the Fifth Amendment to the United States Constitution.

as recognized by the majority, clearly intended that a person committing a felony with a firearm be convicted and punished for both the underlying felony and armed criminal action. "Any person who commits any felony under the laws of this State by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action . . . . The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." Section 559.225, RSMo Supp. 1976. The uncertainty as to legislative intent in Whalen is not present here. Further, it was noted there that "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." Whalen, __U.S.__, 100 S. Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980). The penalties imposed here were explicitly provided by the legislature. The problem of ambiguity for which the rule of lenity provides an important safeguard against prosecutorial and judicial arbitrariness, simply is not present. In sum, when the legislative intent that an act be punished as two crimes is clear, the potential for arbitrariness by prosecutors and judges is de minimus. As a result, no issue of constitutional dimension arises under the Fifth Amendment by the operation of our Missouri armed criminal action statute.

An examination of earlier United States Supreme Court opinions and recent summary actions by that Court points up the validity of our Missouri armed criminal action scheme under which a person who commits a felony with a dangerous and deadly weapon may be found guilty of two offenses, armed criminal action and the underlying felony. In Jeffers v. United States, 432 U.S. 137, 147-150 (1977), the Court assumed arguendo, that 18 U.S.C. 846 (conspiracy to distribute heroin) was a lesser included offense of

18 U.S.C. 848 (conducting an enterprise to distribute heroin), and held that a defendant convicted of 846 in a prior proceeding had no double jeopardy claim in respect to a later 848 prosecution because the defendant had earlier successfully moved to sever the charges. A fortiori, it may be said that Jeffers, who was tried and convicted in two proceedings for two offenses, one of which the Court assumed to be a lesser included offense, could have been tried for both in a single proceeding and so it is with Sours.

The majority's reliance on Harris v. Oklahoma, 433 U.S. 682 (1977) and Brown v. Ohio, 432 U.S. 161 (1977), is misplaced. First, Harris and Brown were successive prosecution cases involving the serious risks of vexation and harassment to criminal defendants attendant in multiple prosecutions. Further, the precise issue presented here was specifically reserved by the Court in Simpson v. United States, 435 U.S. 6, 11-12 (1978), decided some eight months following Harris, which teaches that Harris was not, as asserted by the majority, dispositive of the issue here. I might add that the mandate of the Court in Sours does not direct us to decide this case "in the light of Harris v. Oklahoma." Harris merely held that a defendant's conviction of felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against that same defendant for robbery. Harris v. Oklahoma, 433 U.S. 682 (1977). Brown decided only that once a defendant was convicted of misdemeanor joyriding, the State was barred by double jeopardy from convicting the defendant of the greater included offense of felony auto theft in a subsequent prosecution. "[T]he Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense," (Emphasis added), Brown v. Ohio, 432 U.S. 161 at 169 (1977). Indeed the Court in Brown reiterated at 165 the

freedom of the legislature to proscribe criminal conduct and prescribe punishment.

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. Brown v. Ohio, 432 U.S. 161, 165.

Not only does the majority disregard the Court's consistent concern in decisions from Lange to Whalen with the scope of legislative authorization as to double punishment claims, it also fails to recognize that the defendant's interest in finality, the core value furthered by the Double Jeopardy Clause, is not implicated in unitary prosecution cases. The prime consideration in this unitary prosecution case is the legislative objective of deterring violent offenders by increasing penalties for felonies committed with a weapon.[8] The principal opinion effectively thwarts that objective.

The majority fails to discuss the recent action of the Court on a nearly identical issue dismissing an appeal for want of a substantial federal question. The Court dismissed the appeal from a Michigan Supreme Court decision holding that consecutive punishment does not violate the federal constitution's Fifth Amendment. Wayne County

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[8] At the time of the enactment of the armed criminal action statute law enforcement authorities initiated a publicity campaign warning "use a gun, go to prison." Whether the armed criminal action statute sub judice furthered these important goals is a matter for legislative determination. Fixing punishment for crimes defined by statute is the province of the legislature, not the courts. State v. Alexander, 315 Mo. 199, 285 S.W. 984, 985 (1926); State v. Higgins, 592 S.W.2d 151, (Mo. banc 1979), appeal dismissed, ___U.S.___, 100 S. Ct. 1825 (1980).

Prosecutor v. Recorder's Court Judge and People v. Brintley, 280 N.W.2d 793 (Mich. 1979) appeal dismissed sub nom Brintley v. Michigan, 444 U.S. 948, 100 S. Ct. 418, 62 L.Ed.2d 317 (1979). There, the Michigan Supreme Court addressed the constitutionality of convictions under a Michigan statute (similar to the Missouri armed criminal action statute) providing that a felony committed by a person with a firearm constituted an additional offense, for which one convicted was to be punished consecutively to the sentence imposed on the underlying felony. Defendant contended his convictions violated rights protected by the Fifth Amendment. See MCLA 750.227(b);[9] Id. at 794. The Michigan Court, in a persuasive and comprehensive opinion dealing with the

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[9] MCLA 750.227(b) provides:

> (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.
>
> (2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.
>
> (3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

As is readily apparent from the face of the statute, it is indistinguishable in all important details from the Missouri armed criminal action statute. See n.8 supra.

precise question here presented, held that by enacting the felony-firearm statute the legislature created a separate crime distinct from the underlying felony and intended that consecutive punishments be imposed. Brintley, 280 N.W.2d 793 at 795-796. In one of the cases involved in that consolidated appeal, People v. Brintley, the court firmly concluded that conviction of both felony firearm and armed robbery offenses (described as the "same offense" under the majority opinion here) was not violative of the federal constitution's protection against double jeopardy. Id. at 799-800. Of prime importance here, the United States Supreme Court dismissed the appeal from that judgment "for want of substantial federal question." 444 U.S. 948. The Court's refusal to disturb the conclusion of the Michigan Supreme Court that conviction of both felony-firearm and armed robbery in a single proceeding did not violate the Fifth Amendment's prescription has precedential value as a disposition on the merits. See Hicks v. Miranda, 422 U.S. 332, 344-345 (1975). We are bound to follow that summary decision under the command of the Supremacy Clause as to all federal questions. Art. VI, § 2, United States Constitution. As recently explained by the United States Supreme Court, "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173 at 176 (1977). Here the majority has reached a decision diametrically opposed to the conclusion reached in Brintley and seems unconcerned that the appeal was dismissed by the Supreme Court for

want of a substantial federal question. In the jurisdictional statement to the appeal filed by Brintley, a claim was made that conviction of both felony-firearm and armed robbery violated the double jeopardy doctrine.[10] The Supreme Court necessarily rejected that claim when it dismissed the appeal. Yet the majority ignores or overlooks Brintley and decides the same issue on federal constitutional grounds. While such action is defensible in the context of adjudication of state constitutional provisions, it does not square with the command of the Supremacy Clause and the role of state courts in the federal system when federal questions are presented.

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10 In the jurisdictional statement filed on October 15, 1979, in Brintley v. Michigan, No. 79-5506, appeal dismissed, 444 U.S. 948 (1980), Brintley's counsel argued that conviction and consecutive punishment in one proceeding for armed robbery and felony-firearm under MCLA 750.227b constituted double jeopardy as multiple punishment. The argument headings contained in the statement of jurisdiction spell out this claim. "I. THE DOUBLE JEOPARDY CLAUSE IS A SUBSTANTIVE LIMITATION ON THE MICHIGAN LEGISLATURE." Appellant's Statement of Jurisdiction, page 8. "II. THE VIOLATION OF §750.227b ALLEGED IN COUNT II OF EACH INFORMATION REQUIRED PROOF OF ALL ELEMENTS CONTAINED IN COUNT I, AND THUS THE OFFENSES WERE THE SAME FOR DOUBLE JEOPARDY PURPOSES." Appellant's Statement of Jurisdiction, page 11. "III. CONVICTION UNDER §750.227b REQUIRES PROOF OF A SPECIFIC FELONY." Appellant's Statement of Jurisdiction, page 12. "IV. MR. BRINTLEY'S SENTENCE HAS BEEN TWICE AUGMENTED UNDER TWO STATUTES WHICH ARE THE SAME FOR DOUBLE JEOPARDY PURPOSES." Appellant's Statement of Jurisdiction, page 15. "V. THE DOUBLE JEOPARDY CLAUSE BARS MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OCCURRING AT ONE PLACE, AT ONE TIME, AND FOR ONE PURPOSE." Appellant's Statement of Jurisdiction, page 16. The Supreme Court necessarily rejected all these contentions in respect to MCLA 750.227b virtually identical in its consecutive punishment scheme to § 559.225, RSMo Supp. 1976. Such rejection is of precedential value in this case and we are bound to follow it. Hicks v. Miranda, 422 U.S. 332, 344, 345 (1975).

Neither do subsequent doctrinal developments justify the majority's disregard of the Court's summary action in Brintley. As previously noted in Whalen, the Court's most recent pronouncement, the constitutional issue was discussed in terms of whether the punishment imposed exceeds the legislative authorization. Having determined Congress did not intend consecutive punishments by enacting D.C. Code 23-112, the Court stated, "Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23-112." Whalen, ___U.S.___, 100 S. Ct. 1432, 1439, 63 L.Ed.2d 715, 725 (1980). We might add, if the Congress has such latitude, why not the Missouri General Assembly?

I conclude the majority opinion confers upon courts a role neither contemplated by those who ratified the Fifth Amendment nor supported by subsequent Supreme Court decisions interpreting it. As Justice Frankfurter analyzed a similar claim, "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." Citations omitted. Gore v. United States, 357 U.S. 386 at 393 (1958). I submit the majority opinion in the name of double punishment doctrine invades the power of the legislature to define crimes and prescribe punishment. Accordingly, I must dissent.

ALBERT L. RENDLEN, Judge

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No. 80-5492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

TOMMY WHACK

Appellant

v.

STATE OF MARYLAND

Appellee

ON APPEAL FROM THE

COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. HANDEL,
Assistant Attorney General

PHILIP M. ANDREWS,
Assistant Attorney General

One South Calvert Building
Baltimore, Maryland 21202
659-4048

For Appellee

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Appellee, State of Maryland, pursuant to Rule 16 of this Court, moves to dismiss the above-entitled appeal, or in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the grounds that the appeal fails to present any substantial federal question, and that this case does not properly invoke the appellate jurisdiction of this Court.

QUESTION PRESENTED

Does the Double Jeopardy Clause prohibit imposition of cumulative punishments for convictions, obtained in a single proceeding, of offenses deemed "the same offense," despite the holding of the State's highest court that the legislature intended such a result?

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OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at ____ Md. ____, 416 A.2d 265 (1980).

JURISDICTION

Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1257(2).

STATEMENT OF THE CASE

This is a direct appeal from the judgment of the Court of Appeals of Maryland (hereinafter, "the Court of Appeals"). The opinion of the Court of Appeals, filed July 7, 1980, was preceded by an unreported per curiam decision (Whack v. State, September Term, 1978, No. 1394, July 27, 1979) of the Court of Special Appeals of Maryland, which affirmed the conviction and sentencing of Appellant by the Circuit Court for Prince George's County, Maryland. In the circuit court proceeding, Appellant was convicted by a jury of robbery with a deadly weapon and use of a handgun in commission of that crime and was sentenced to consecutive terms of twenty years and five years pursuant to Article 27, §§ 36B(d) and 488 of the Annotated Code of Maryland.

In challenging the consecutive sentences imposed by the trial court, Appellant pressed two contentions in the Court of Appeals: first, that the Maryland General Assembly, in enacting §§ 488 and 36B(d), did not intend to authorize the imposition of both the penalty under § 488 for the use of a dangerous or deadly weapon, and the enhanced penalty of from five to fifteen years under § 36B(d) for use of a handgun; and second, that if the legislature did so intend, the imposition of both enhanced penalties would nevertheless violate the Fifth Amendment's prohibition against double jeopardy.

The Court of Appeals rejected both contentions after determining that the legislature's intent to impose consecutive punishment under §§ 488 and 36B(d) was controlling. The court specifically relied upon the legislature's Declaration of Policy, set forth in Article 27, § 36B(a), in recognizing the General Assembly's view of handguns "as a particularly aggravating problem and one not effectively controlled by the laws applicable to weapons generally." 416 A.2d at 270. After reviewing the provisions of the handgun control statute, Art. 27, §§ 36B - 36F, the court found a clear and plain legislative intent to permit imposition of consecutive sentences under the statutes in question when one commits a robbery with a handgun. Id. at 271. The Court of Appeals distinguished Simpson v. United States, 435 U.S. 6 (1978), a case Appellant argued was dispositive, by comparing the unmistakeable rationale of the Maryland legislature with the absence of legislative history pertaining to the challenged statute in Simpson. Id. at 269.

The Court of Appeals incorporated its legislative intent analysis as the basis for rejecting Appellant's double jeopardy claim. Having previously determined that the "required evidence" test of Blockburger v. United States, 284 U.S. 299 (1932), was essentially a rule of statutory construction, citing Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 1438 (1980), the

court further relied on Newton v. State, 280 Md. 260, 284, 373 A.2d 262, 269, n. 4 (1977):

> "It should be noted, however, that under certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test do[es] not violate the Fifth Amendment prohibition against double jeopardy . . . [T]he legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test. . . ."

416 A.2d at 271.

ARGUMENT

I.

THIS CASE IS NOT WITHIN THE APPELLATE JURISDICTION OF THIS COURT AND MUST BE DISMISSED.

Appellant has chosen an incorrect and untimely avenue for seeking this Court's review of his state court conviction. His contention here is that the double jeopardy clause prohibits the imposition of cumulative punishments for convictions obtained in a single proceeding of crimes deemed "the same offense" despite the holding of the State's highest court that the Legislature intended such a result. In essence, the constitutionality vel non of the state statute itself is not brought into question; instead, Appellant argues that his right to be free from double jeopardy precludes application or use of the statute to the circumstances of his case. The decision of the Court of Appeals did not consider the constitutionality of the statute because no such challenge was presented to it. In this posture, review may be had by certiorari only. 28 U.S. Code, §§ 1257(2) and (3); Kulco v. Superior Court of California, 436 U.S. 128 (1978); see also Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

Accordingly, the appeal should be dismissed and the papers treated as an application for a writ of certiorari. Such an application must in turn be denied, for the reasons asserted in Argument II, infra, as well as for the reason that Appellant has

failed to comply with the time limits of Rule 22 of this Court which requires a petition for a writ of certiorari be filed within 60 days after entry of the lower court's judgment. The judgment of the Court of Appeals was filed on July 7, 1980; this appeal was not filed until October 3, 1980, well beyond the applicable 60 day limitation.

II.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL.

The lack of a substantial federal question is patent in this case. The Court of Appeals correctly decided the issues herein on state statutory grounds by determining the Maryland legislature's plain intention that the punishment for robbery with a dangerous or deadly weapon could be coupled with a separate consecutive sentence under § 36D(d) of handgun control act. By directing its inquiry to ascertaining legislative intent, the Court of Appeals properly applied the analysis of this Court's recent decisions in this area. See, e.g., Whalen, supra; Busic v. United States, ___ U.S. ___, 100 S.Ct. 1747 (1980).

In Brown v. Ohio, 432 U.S. 161 (1977), this Court observed that the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors, and that the legislature remains free under the double jeopardy clause to define crimes and fix punishments. 432 U.S. at 165. Enactment of legislation serves to limit courts, which may not impose more than one punishment for the same offense, and prosecutors, who ordinarily may not attempt to secure that punishment in more than one trial. Id. However, the double jeopardy clause does not substantively restrict the legislative branch:

> Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. See Gore v. United States, 357 U.S. 386 (1958); Bell v. United States, 349 U.S. 81 (1955); Ex Parte Lange, 18 Wall 163, 21 L.Ed. 872 (1874).

Id. Accord, Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 1436 (1980); Ianelli v. United States, 420 U.S. 770, 785, n. 17 (1975).

Thus in determining whether a sentencing court has properly stayed within its legislative authorization when imposing multiple punishments, the intent of the legislature is paramount. Appellant suggests in his jurisdictional statement that this Court has on three previous occasions (Whalen, Simpson and Busic) accepted cases presenting issues similar to those he now raises. However, Appellant acknowledges those cases never reached "the constitutional question" because each was decided on statutory grounds which obviated the need for constitutional srutiny. This Court's approach in those cases obviously reflects adherence to the longstanding doctrine that it will avoid a constitutional ruling where a statutory ruling would suffice. See Hagans v. Levine, 415 U.S. 528 (1974); Ashwander v. TVA, 297 U.S. 288, 347 (Brandeis, J., concurring). In each case, the Court's decision turned on ascertainment of congressional intent regarding the imposition of sentence; where that intent was unclear, such as in Whalen, this Court "applied the rule of lenity" and held that the multiple punishment could not stand. Whalen, ___ U.S. ___, 100 S.Ct. at 1436.

In the instant case, the penalties imposed were explicitly authorized by the Maryland legislature in an unambiguous manner, rendering application of the rule of lenity inappropriate. Where the legislative authorization is clear, the potential for arbitrariness by prosecutors and courts is minimal and no issue of constitutional dimension arises under the Fifth Amendment by the imposition of sentences upon Appellant pursuant to Article 27, §§488 and 36B(d).

Finally, it is instructive to note this Court's recent disposition of an appeal from the decision of the Michigan Supreme Court in People v. Brintley, which was consolidated with

Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979), appeal dismissed sub nom. Brintley v. Michigan, (Mem.) 444 U.S. 948 (1979). In Brintley, the defendant was convicted of the separate crimes of armed robbery, and possession of a firearm during a felony. He received consecutive sentences in accordance with Michigan's felony firearm statute which is essentially identical to the Maryland handgun statute at issue in the instant case.[1] The Court of Appeals of Michigan, in an opinion reported at 272 N.W.2d 587, vacated the firearm possession conviction, on the grounds that the double jeopardy clauses of the United States and the Michigan Constitutions were violated by the separate convictions and cumulative punishments for the armed robbery felony and the firearm felony.

The Michigan Supreme Court, in a well-reasoned opinion, reversed the lower appellate court and reinstated Brintley's firearm conviction. In addition to finding a clear legislative intent to punish firearm possession by a separate sentence consecutive to that imposed for the underlying felony, the Michigan Supreme Court also determined that neither the federal nor state double jeopardy clauses is an impediment to the imposition of consecutive sentences. 280 N.W.2d at 796-801.

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[1] Michigan's felony firearm statute, MCL § 750.227b; M.S.A. § 28.-424(2) states in pertinent part:

> "A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 [carrying a concealed weapon] or section 227a [unlawful possession of a weapon by a licensee], is guilty of a felony, and shall be imprisoned for 2 years.
>
> * * * *
>
> The term of imprisonment prescribed by this seciton shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony."

Brintley's appeal to this Court was dismissed for want of a substantial federal question, 444 U.S. 948 (1979). The precedential effect of that dismissal anticipates that this appeal, presenting the same issues, on essentially identical facts, with similar statutes, should also be dismissed. See Hicks v. Miranda, 422 U.S. 332, 344-345 (1975); Mandel v. Brantley, 432 U.S. 173, 176 (1977).

CONCLUSION

For the foregoing reasons, Appellee prays that the appeal be dismissed or the decision of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

Deborah K. Handel

DEBORAH K. HANDEL,
Assistant Attorney General

Philip M. Andrews

PHILIP M. ANDREWS,
Assistant Attorney General

For Appellee